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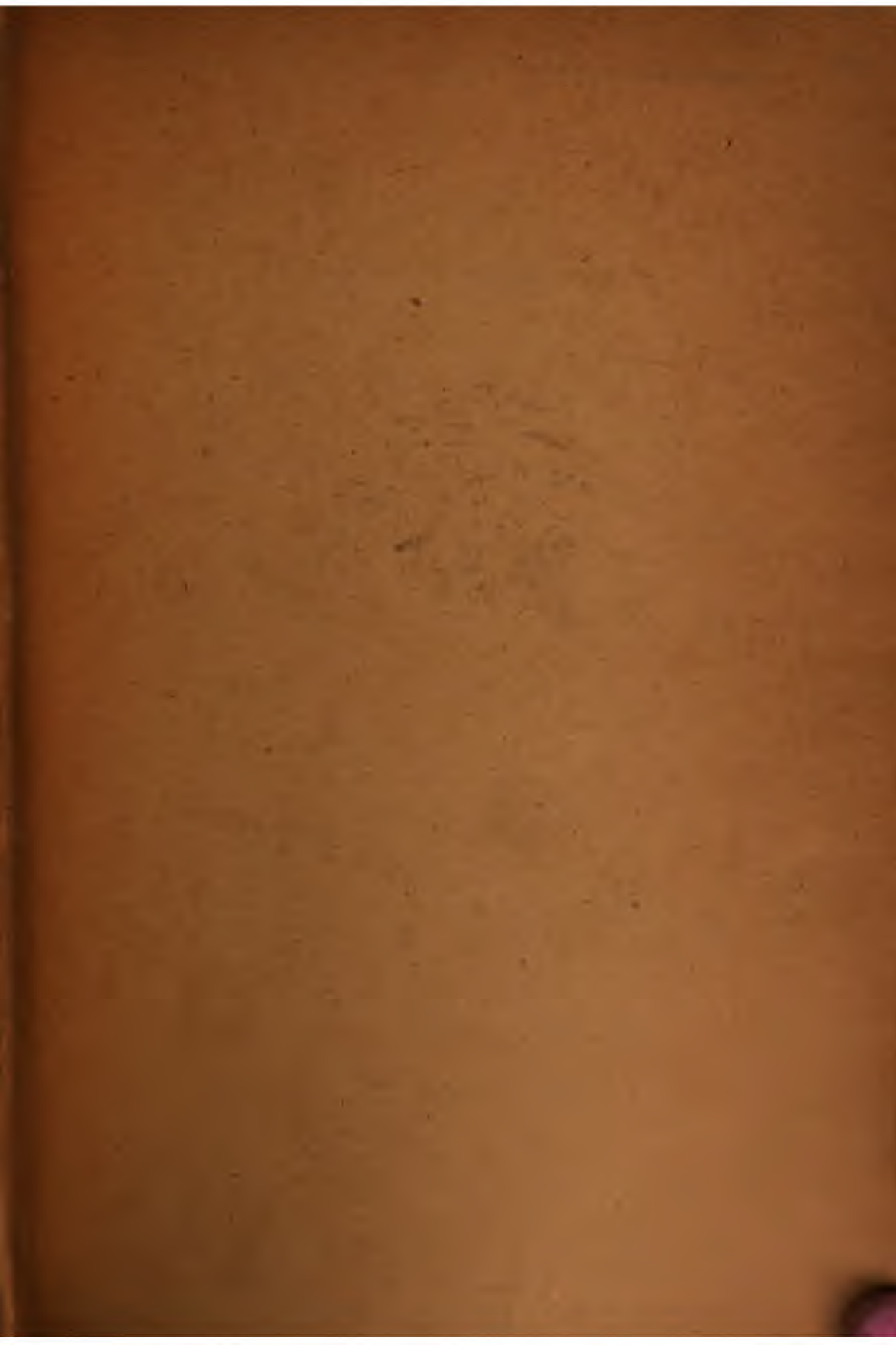
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A DIGEST OF CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

FROM THE ORGANIZATION OF THE COURT, IN 1875,
TO THE 1ST DAY OF MAY, 1893.

COMPRISING THE

CASES REPORTED IN VOLUMES 1 TO 21, BOTH INCLUSIVE, OF
THE OFFICIAL REPORTS OF THE COURT, AND ALSO
THE UNREPORTED CASES DECIDED
DURING THAT PERIOD.

BY

ROBERT CASSELS, ESQ.

*One of Her Majesty's Counsel,
and
Registrar of the Court.*

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OF THE

SUPREME COURT OF CANADA.

—:O:—

CHIEF JUSTICES.

HON. SIR WILLIAM BUELL RICHARDS, KNT., appointed 8th October, 1875.
HON. SIR WILLIAM JOHNSTONE RITCHIE, KNT., appointed 11th January, 1879.
HON. SIR HENRY STRONG, KNT., appointed 13th December, 1892.

JUDGES.

HON. WILLIAM JOHNSTONE RITCHIE, appointed 8th October, 1875.
HON. HENRY STRONG, appointed 8th October, 1875.
HON. JEAN THOMAS TASCHEREAU, appointed 8th October, 1875.
HON. TÉLÉSPHORE FOURNIER, appointed 8th October, 1875.
HON. WILLIAM ALEXANDER HENRY, appointed 8th October, 1875.
HON. HENRI ELZÉAR TASCHEREAU, appointed 7th October, 1878.
HON. JOHN WELLINGTON GWYNNE, appointed 14th January, 1879.
HON. CHRISTOPHER SALMON PATTERSON, appointed 27th October, 1888.
HON. ROBERT SEDGEWICK, appointed 18th February, 1893.

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REGISTRAR.

ROBERT CASSELS, Q.C., appointed 8th October, 1875.

REPORTER.

GEORGE DUVAL, Q.C., appointed 20th January, 1876.

ASSISTANT REPORTERS.

CHARLES HARDING MASTERS, Barrister-at-Law, appointed temporarily 17th September, 1885.

ARCHIBALD SANDWITH CAMPBELL, Solicitor, appointed 3rd March, 1886.

CHARLES HARDING MASTERS, Barrister-at-Law, appointed 1st October, 1886.

LIBRARIAN.

HARRIS HARDING BLIGH, Q.C., appointed 1st July, 1893.

MINISTERS OF JUSTICE AND ATTORNEYS-GENERAL OF THE DOMINION OF CANADA SINCE THE ORGANIZATION OF THE COURT.

HON. EDWARD BLAKE, appointed 19th May, 1875.
HON. RODOLPHE LAFLAMME, appointed 8th June, 1877.
HON. JAMES McDONALD, appointed 17th October, 1878.
HON. SIR ALEXANDER CAMPBELL, K.C.M.G., appointed 20th May, 1881.
HON. SIR JOHN S. D. THOMPSON, K.C.M.G., appointed 25th September, 1885.

ABBREVIATIONS.

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|---|--|
| <p>A. J. A. Ont., <i>Administration of Justice Act, Ontario.</i></p> <p>All. N. B., <i>Allen's New Brunswick Reports.</i></p> <p>B. C., <i>British Columbia.</i></p> <p>B. N. A. Act, <i>British North America Act, 1867.</i></p> <p>C. C. or
C. C. P. Q. or } <i>Civil Code of the Province of Quebec.</i>
C. C. L. C. }</p> <p>Can. S. C. R., <i>Supreme Court of Canada Reports.</i></p> <p>C. L. J., <i>Canada Law Journal.</i></p> <p>C. L. T., <i>Canada Law Times.</i></p> <p>C. C. P. or
C. C. P. P. Q. or } <i>Code of Civil Procedure of the Province of Quebec.</i>
C. C. P. L. C. }</p> <p>C. L. P. Act, <i>Common Law Procedure Act.</i></p> <p>C. S. N. B., <i>Consolidated Statutes of New Brunswick.</i></p> <p>C. S. O., <i>Consolidated Statutes of Canada.</i></p> <p>C. S. L. C., <i>Consolidated Statutes of Lower Canada.</i></p> <p>C. S. U. C., <i>Consolidated Statutes of Upper Canada.</i></p> <p>D., <i>Dominion of Canada.</i></p> <p>Dor. Q. B. R., <i>Dorion's Queen's Bench Reports, Lower Canada.</i></p> <p>Gaz. or Can. Gaz., <i>Canadian Gazette, (London, Eng.).</i></p> <p>Gr., <i>Grant's Chancery Reports:</i></p> <p>L. C., <i>Lower Canada.</i></p> <p>L. C. Jur., <i>Lower Canada Jurist.</i></p> <p>L. C. R., <i>Lower Canada Reports.</i></p> <p>M., <i>Manitoba.</i></p> <p>M. C. P. Q., <i>Municipal Code of the Province of Quebec.</i></p> | <p>M. L. R., Q. B., <i>Montreal Law Reports, Queen's Bench.</i></p> <p>M. L. R., S. C., <i>Montreal Law Reports, Superior Court.</i></p> <p>N. B., <i>New Brunswick.</i></p> <p>N. B. R., <i>New Brunswick Reports.</i></p> <p>N. S., <i>Nova Scotia.</i></p> <p>O. or Ont., <i>Ontario.</i></p> <p>Ont. R., <i>Ontario Reports.</i></p> <p>Ont. App. R., <i>Ontario Appeal Reports.</i></p> <p>Ont. Jud. Act, <i>Ontario Judicature Act.</i></p> <p>P. E. I., <i>Prince Edward Island.</i></p> <p>P. & B. or Pugs. & Bur., <i>Pugsley and Burbidge, New Brunswick Reports.</i></p> <p>P. Q., <i>Province of Quebec.</i></p> <p>Q., <i>Quebec.</i></p> <p>Q. B. L. C., <i>Queen's Bench of Lower Canada.</i></p> <p>Q. L. R., <i>Quebec Law Reports.</i></p> <p>R. S. N. S., <i>Revised Statutes of Nova Scotia.</i></p> <p>R. S. O., <i>Revised Statutes of Ontario.</i></p> <p>Russ. & Geld., <i>Russell and Geldert, Nova Scotia Reports.</i></p> <p>S. C., <i>Supreme Court.</i></p> <p>S. C. A. or
S. & E. C. A. } <i>Supreme and Exchequer Courts Act.</i></p> <p>S. C. A. A., <i>Supreme Court Amendment Act.</i></p> <p>S. C. Dig., <i>Cassels's Supreme Court Digest.</i></p> <p>U. C. C. P., <i>Upper Canada Common Pleas Reports.</i></p> <p>U. C. Q. B., <i>Upper Canada Queen's Bench Reports.</i></p> <p>U. C. O. S., <i>Old Series of Upper Canada Reports.</i></p> |
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DIGEST OF CASES

DECIDED BY THE

SUPREME COURT OF CANADA.

Abandonment.

See INSURANCE, MARINE, 2, 5, 6, 9, 15, 19, 20.

Abatement.

See ACTION, 5.

Absent and Absconding Debtor.

See CORPORATIONS, 5.

Acceptance—Evidence of.

See SALE OF GOODS, 6.

Accident.

See ACTION, 5, 8.

RAILWAYS AND RAILWAY COMPANIES, 2, 7, 23, 26,
46, 49, 50, 57, 58, 66, 69.

INSURANCE, LIFE, 7

LANDLORD AND TENANT, 6.

Accord and Satisfaction.

See CONTRACT, 2.

Account—Decree for—Imputation of payments—Appropriation by debtor—Statute of Limitations.

See PAYMENT, 5.

2. Action of—Proceeds of sale of timber.

See TIMBER, 5.

Account—Continued.

3. *Action en reddition de compte—Contradictory averments in plea—Effect of—Unsworn account.*

In an action *en reddition de compte* by an assignor against his assignee, the assignee by his plea answered that he was not bound to render an account, and at the same time alleged that he had already accounted for the moneys as garnishee in another suit, but he produced an unsworn account, and asked the court to declare the same to be a true and faithful account of his administration, and prayed for the dismissal of the plaintiff's action.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side) dismissing the plaintiff's action, and restoring the judgment of the Court of Review, that although the parties had joined issue and heard witnesses to prove certain items of the unsworn account produced, the plaintiff was first entitled to a judgment of the court ordering the defendant to produce a sworn account supported by vouchers, and therefore his action had been improperly dismissed.

L'Heureux v. Lamarche.—vii. 460.

4. *Reddition de comptes—Settlement by mandator with his mandatory without vouchers, effect of—Action en réformation de compte.*

Held, affirming the judgment of the court of Queen's Bench for Lower Canada (appeal side), that if a mandator and a mandatory, laboring under no legal disability, come to an amicable settlement about the rendering of an account due by the mandatory without vouchers or any formality whatsoever, such a rendering of account is perfectly legal; and that if subsequently the mandator discovers any errors or omissions in the account his recourse against his mandatory is by an action *en réformation de compte*, and not by an action asking for another complete account.

Gillespie v. Stephens.—xiv. 709.

5. *Account—Indivisibility of—By curator—Release—Effect of.*

P. A. A. D., respondent, as representing the institutes and substitutes under the will of the late J. D., brought an action against J. B. T. D. (appellant), who was one of the institutes and had acted as curator and administrator of the estate for a certain time, for reddition of an account of three particular sums, which the plaintiff alleged the defendant had received while he was a curator.

Held, reversing the judgment of the court of Queen's Bench for Lower Canada (appeal side), that an action did not lie against the appellant for these particular sums apart and distinct from an action for an account of his administration of the rest of the estate.

The plaintiff in his action alleged that he represented S. D., one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of the defendant a sum of £447 7s. 6½d., the defendant having in an action of reddition of account settled by notarial deed of settlement with the said S. D. for the sum of \$4,000 which he agreed to pay and for which amount the plaintiff became surety.

Account—Continued.

Held, that as the notarial deed of settlement gave the defendant a full and complete discharge of all reditions of account as curator or administrator of the estate, the plaintiff could not claim a further reddition of account of these particular sums.

The plaintiff also claimed that he represented F. D. and E. D. two other institutes under the will, in virtue of two assignments made to him by them on the 21st January, 1869, and 15th November, 1869, respectively. In 1865, and after the defendant had been sued in an action of reddition of account by a deed of settlement the said F. D. and E. D. agreed to accept as their share in the estate the sum of \$4,000 each, and gave the defendant a complete and full discharge of all further reditions of account.

Held, affirming the judgment of the Court of Queen's Bench, that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligations he had contracted under the deed of settlement.

Dorlon v. Dorlon.—xx. 430.

6. Rendering of accounts—Effect of—Appropriation of payments

See PAYMENT, 10.

Accretion—Accrues to owner of adjacent land—Right of Way —Implied Extinction by Statute—Cobourg Harbour Works —22 V. c. 72.

By 10 Geo. IV. c. 11, the Cobourg Harbour Company were authorized to construct a harbour at Cobourg, and also to build and erect all such needful moles, piers, wharves, buildings and erections whatsoever, as should be useful and proper for the protection of the harbour, and to alter and amend, repair and enlarge the same as might be found expedient. The Harbour Company commenced their work in 1820 by running a wharf, southerly from the road allowance between lots 16 and 17 of the Township of Hamilton, which now forms Division Street in the town of Cobourg. By means of the mud and earth raised by dredging and gradual accretions, which were prevented from being washed away by being confined by crib-work, the original wharf was widened to the full width of Division Street, and in addition they constructed a store house and placed a fence dividing it from the land which appellant (whose lot fronted on Division Street, and extended to the water's edge,) had gained by accretion since the original wharf was made. Thereupon the appellant filed a bill complaining that his access to this alluvial land was obstructed by the store house and fence which the respondents caused to be placed on the addition to the wharf, and praying that the respondents, other than the Attorney-General, be decreed to remove them.

Held, 1. That land gained by alluvial deposits arising from natural or artificial causes, or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible, accrues to the owner of the adjacent land. 2. That the store house and fence complained of in this case, were not constructed on any part of Division Street, but on an artificial structure constructed under the authority of a statute, on

Accretion—Continued.

the line of Division Street for harbour purposes, and therefore, appellant was not entitled to be indemnified because he is denied access to his alluvial land through the premises of the respondents. 3. That the public right of way from the end of Division Street to the waters of Lake Ontario, was extinguished by statute by necessary implication. *Corporation of Yarmouth v. Simmons*, L. R. 10 Ch. D. 518, followed.

Standly v. Perry.—iii. 356.

2. Of marsh lands.

See TRESPASS, 10.

Acknowledgment of Debt—What sufficient.

See LOAN.

SALE OF LANDS, 9.

Acquiescence—A knowledge of the facts necessary to constitute.

See MORTGAGE, 16.

Action—In rem, by mother of deceased child.

See MARITIME COURT OF ONTARIO, 3.

2. Petitory—To recover church property.

See PETITORY ACTION.

3. En reddition de compte—Plaintiff entitled to sworn account supported by vouchers—When unsworn account pleaded by defendant and evidence given respecting certain items thereof upon issue joined by plaintiff, the latter is not debarred from demanding a sworn account.

See ACCOUNT, 3.

4. By individual shareholders of company—Delay in bringing—Parties.

See CORPORATIONS, 29.

5. *Abatement of—Death of plaintiff—Actio personalis moritur cum persona—Railway accident—Lord Campbell's Act.*

P. brought an action against a conductor of the I. C. R. for injuries received in attempting to board a train and alleged to be caused by the negligence of the conductor in not bringing the train to a stand still. On the trial P. was non-suited, and, on motion to the full court, the non-suit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial, P. died, and a suggestion of his death was entered on the record. On appeal to the Supreme Court of Canada from the order of the full court:

Held, that under Lord Campbell's Act, or the equivalent statute in New Brunswick, C. S. N. B. c. 86, an entirely new cause of action arose on the death of P., and the original action was entirely gone and could not be revived.

There being no cause before the court, the appeal was quashed without costs.

White v. Parker.—xvi. 699.

Action—Continued.**6. Notice of.**

See NOTICE, 5, 8, 18.

MALICIOUS ARREST.

MUNICIPAL CORPORATIONS, 25, 26.

7. Moneys entrusted for investment—Condition precedent—Prescription—Art. 2262—Transfer—Prête-nom.

Money was entrusted to M. for the purpose of being invested in a land speculation, but was not so used, and a claim against M. therefor was transferred *sous seing privé* to J., who brought an action for the amounts so entrusted.

Held, that it appearing that the transfer *sous seing privé* had been admitted by M., the transferee, even if considered a *prête-nom*, had a sufficient legal interest to bring the action.

Moodle v. Jones. —xix. 266.

8. Injury resulting in death—Claim of widow—Prescription—Arts. 1056, 2261, 2262, 2267, 2188, C. C.—Arts. 431, 433, C. P. C.

The husband of respondent was injured while engaged in his duties as appellants' employee, and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the life-time of the husband, the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death.

Held, reversing the judgment of the Superior Court, and the Court of Queen's Bench for Lower Canada (appeal side) (Fournier, J. dissenting) (1) That the respondent's right of action under Art. 1056, C. C. depends not only upon the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the article of the code does not give a right of action, and creates no liability whatever on the person inflicting the injury.

(2) That as it appeared on the record that the plaintiff had no right of action, the court would grant the defendant's motion for judgment *non obstante veredicto*. Art. 438, C. P. C.

(3) That at the time of the death of the respondent's husband all right of action was prescribed under Art. 2262, C. C., and that this prescription is one to which the tribunals are bound to give effect although not pleaded. Arts. 2267 and 2188, C. C.

The Canadian Pacific Railway Co. v. Robinson. —xix. 292.

[The judgment in this case was reversed by the Judicial Committee of the Privy Council—See [1892] A. C. 481].

Adjoining Land Owners—Liabilities and rights of.

See EASEMENTS.

DAMAGES, 20.

Adjudication—By sheriff to joint purchasers—Security required by Art. 688, C. C. P.—Rights of joint adjudicataires.

See SHERIFF, 7.

Administration Order—Proceedings under—Claim on promissory notes assigned by holder to claimant under agreement to divide proceeds—Champerty—Subsequent proof by original holder of notes—Statute of Limitations—Practice.

See CHAMPERTY.

Administrators—Action against—Evidence of plaintiff as to dealings with deceased not admissible—R. S. N. S. 4th Series, c. 96, s. 41.

See EVIDENCE, 4.

2. With will annexed—Purchase of land by, when personal assets sufficient to pay off encumbrance.

See WILL, 3.

3. Militia Act—31 V. c. 40, s. 27—36 V. c. 46—42 V. c. 35—Suit by commanding officer who dies while suit pending—Right of administratrix to continue proceedings.

See MILITIA ACT.

4. Sale by under Imp. Stat. 5 Geo. II. c. 7, validity of.

See MORTGAGE, 18.
EXECUTORS.

Advances—To get out timber—Lien for.

See LIEN, 2.

2. To get out timber—Proceeds of sales—Account.

See TIMBER, 5.

Affidavit—To support application for arrest—Reasonable and probable cause.

See CAPIAS.

2. Of deceased person, not admitted as evidence on a débats de comptes.

See EVIDENCE, 8.

3. Motion to set aside award—Receiving affidavits in reply—Discretion of Court as to.

See ARBITRATION AND AWARD, 7.

4. To bill of sale—Omission of words “before me” and of date—Fatal defect—R. S. N. S. 5th series, c. 92, s. 4.

See CHATTEL MORTGAGE, 11.

Affidavit—Continued.

5. To bill of sale—"Against the creditors of the bargainer"—
Sufficiency of.

See CHATTEL MORTGAGE, 13.

6. Newspaper Act, Manitoba—50 V. c. 23—Authority to publish—
Deposit of affidavit or affirmation—Contents—Who may
make—Authority of commissioner to take.

See LIBEL, 6.

NEWSPAPER.

PRACTICE, 29.

7. To bill of sale—Necessity for stating occupation of grantor—
Reference in affidavit to bill of sale in which occupation
stated.

See CHATTEL MORTGAGE, 17.

**Affirmation—Newspaper Act, Manitoba—50 V. c. 23—Authority to
publish—Deposit of affidavit or affirmation—Who may
affirm.**

See LIBEL, 6.

NEWSPAPER.

PRACTICE, 29.

Agent—Goods sold by, as principal.

See SALE OF GOODS, 2.

2. Insurance agent.

See INSURANCE, FIRE, 1, 2, 4, 10, 11, 26.

INSURANCE, LIFE, 5, 6, 7, 8.

INSURANCE, MARINE, 11, 12, 33.

3. Fraudulent receipt of.

See RAILWAYS AND RAILWAY COMPANIES, 4.

4. In election—Limited powers of.

See ELECTION, 17.

" —What necessary to prove authority of.

See ELECTION, 20.

5. In Supreme and Exchequer Courts.

See PRACTICE OF SUPREME COURT.

6. Deposit in bank—Question as to agency.

See BANKS AND BANKING, 4.

7. To sell land—Selling and obtaining conveyance from pretended
purchaser—Trustee for principal.

See SALE OF LANDS, 5.

Agent—Continued.

8. Contract by, for undisclosed principal
See SALE OF GOODS, 12.
9. Husband may be general agent of wife to manage property devised to her, though will directs he shall have no control of her property.
See EXECUTORS, 5.
10. Real estate agents—Sale of lands by—Duty of, as to making binding agreement.
See SALE OF LANDS, 12.
11. *Sale of lands—Authority to deliver deed and receive purchase money—Agent exceeding authority—Memo. to agent—New agreement.*

One W. sold land under power of sale in a mortgage, and F. became the purchaser, and paid ten per cent. of the purchase money, it being agreed that the balance was to be paid in notes. Shortly after the plaintiff A. brought a deed to F. and demanded the notes. F. wished to show the deed to his attorney, and it was left with him on his delivering to A. a writing as follows:—
 “Received from E. A. a deed given by W. for a certain piece of land bought at auction, Saturday, the thirtieth day of September, 1876, at Midgie. The above mentioned deed I receive only to be examined, and if lawfully and properly executed to be kept, if not lawfully and properly executed to be returned to Edward Anderson. When the said deed is lawfully and properly executed to the satisfaction of my attorney, I, the said Charles Fawcett, will pay the amount of balance due on said deed, five hundred and seventy-two dollars, provided I am given a good warrantee deed, and the mortgage, which is on record, is properly cancelled if required.” The deed was not returned to A. and an action was brought by him to recover the said sum of \$572, named in the above memorandum.

The action was twice tried, and on the last trial a verdict was given for the defendant, under the direction of the judge, and leave was reserved to the plaintiff, to move for a verdict in his favor for nominal damages, the purchase money having in the meantime been paid to W. On plaintiff moving for such leave a majority of the Supreme Court of New Brunswick set aside the verdict of the jury, and entered a verdict for the plaintiff, 19 N. B. R. 22.

On appeal to the Supreme Court of Canada, Held, (reversing the judgment of the court below), Strong, J., dissenting, that the said memorandum did not constitute a new contract between the plaintiff and defendant to pay the purchase money to the plaintiff, who was merely the agent of W., and therefore the verdict for the defendant should stand.

Per Strong J.—That the said writing did constitute a new agreement between the parties, but that if A. was merely an agent of W. in the transaction, he could still sue, as his principal had not interfered.

Appeal allowed with costs.

Fawcett v. Anderson.—22nd June, 1885.

Agent—Continued.

12. *Principal and agent—Contract by agent of two firms—Sale of goods for lump sum—Excess of authority.*

An agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of the goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a rateable apportionment except by the mere arbitrary will of the agent.

There can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly, or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf.

Cameron v. Tate.—xv. 622.

13. *Of mortgagee—Power of attorney—Sale of mortgaged lands—Power of sale—Exercise of—Authority of agent.*

See MORTGAGE, 21.

14. *Executrix—Management of estate—Employment of attorney—Misappropriation of funds by attorney—Liability of executrix for—Art. 1711, C. C.*

See EXECUTORS, 11.

15. *Principal and agent—Agent of bank dealing with funds contrary to instructions—Discounting for his own accommodation.*

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank which he discounted as such agent, and, without endorsing them, used the proceeds, in violation of his instructions, in the business of his firm. The firm having become insolvent the question arose whether these drafts constituted a debt due from the estate to the bank, or whether the bank could repudiate the act of its agent and claim the whole amount from the solvent acceptors.

Held, Gwynne, J., dissenting, that the drafts were debts due and owing from the insolvents to the bank.

Held, per Strong and Patterson, JJ., that the agent being bound to account to the bank for the funds placed at his disposal he became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he had failed to account.

The Merchants Bank of Halifax v. Whidden.—xix. 58.

See BANKS AND BANKING, 24.

16. *Principal and Agent—Speculating in Stocks—Instructions to Broker—Broker's duty—Money paid for margins.*

S., a speculator in stocks, instructed F. a stock-broker to purchase for him a certain number of shares in F. B. stock, expecting to make a profit out of a rise in the value of said stock in the market.—The facts are fully set out in the reports of the case in 6 Ont. R. 505 and 15 Ont. App. R. 541.

Agent—Continued.

Held, affirming the judgment of the Court of Appeal for Ontario, that the relation between S. and F. was that of principal and agent, and F. was bound to purchase the stock and hold it as the property of S. He could not rely on his ability to procure a like number of shares when required, as his interest would be to depreciate their value so as to obtain them cheaply, which would conflict with his duty to S.

F. being about to retire from business as a stock-broker, handed over his stock transactions, including that with S. to C., to which S. consented. C. acknowledged to S. having received from F. the amount paid for margins on the stock which F. was instructed to buy, neither F. nor C. having purchased the stock and set it apart as the property of S.

Held, affirming the judgment of the court below, that C. was liable in an action for money had and received, to refund to S. the amount so paid for margins.

Present: Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

Cox v. Sutherland.—24 C. L. J. 55.—18th Nov., 1887.

Agreement—Construction of—Sale of timber—Consideration—Right to recover back money paid.

C., after having examined a lot, entered into an agreement with W., the owner, whereby the latter sold all the pine timber standing on the lot to C., "such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of \$18 per hundred cubic feet," and C. paid to W. \$1,000, "the balance to be paid for before the timber is removed from the lot." C. cut \$651.17 worth of first-class timber, suitable for the Quebec market, which was all of that class to be found on the lot, and sued W. to recover back the balance of the \$1,000, namely, \$348.83.

Held, that the true construction of the contract was that W. sold and granted to C. permission to enter upon his lot, and cut all the "good merchantable timber there growing, suitable for his purpose," and not merely "first-class timber"; that there was more than sufficient "good merchantable timber" still remaining on the lot to cover the balance of the \$1,000, and that there was no evidence to show that the contract had been rescinded.

Per Taschereau and Gwynne, JJ.—That the payment of the \$1,000 was an absolute payment, the plaintiff believing and representing to defendant that there was sufficient timber to cover that amount, if not more, on the faith of which representation defendant entered into the contract, which he otherwise would not have done, and that if the plaintiff made an error, he, and not the defendant, must suffer the consequences of this error.

Clarke v. White.—iii. 309.

2. Special agreement, non-fulfilment of—Indebitatus counts.

L. sued N. *et al.* to recover from them, under specially endorsed writ, the balance of account due under and in pursuance of an agreement under seal providing that "L. was to run according to his best art and skill a tunnel of 200 feet for the sum of four dollars per running foot; that \$150 should be advanced on account of the contract, the balance to be paid on the satisfactory

Agreement—Continued.

completion of the work." L. made five tunnels, none of which were 200 feet, but claimed he had done in all 204 feet. In addition to the count on the agreement the plaintiff inserted in his declaration the common counts for work and labor.

Held, that there was not a sufficient fulfilment of the agreement, and inasmuch as L. had given no particulars, nor any evidence under the indebtedness counts, the rule absolute of the court below, ordering judgment to be entered for the defendants, should be affirmed and the appeal dismissed with costs.

Lakin v. Nuttall.—iii. 685.

3. Additional parol term in.

See RAILWAYS AND RAILWAY COMPANIES, 6.

4. *Construction of—Property in timber—Ownership and control of timber until payment of draft given for stumpage under the agreement.*

The respondents, owners of timber lands in New Brunswick, granted C. & S. a license to cut on twenty-five square miles. By the license it was agreed *inter alia*: "Said stumpage to be paid in the following manner: Said company shall first deduct from the amount of stumpage on the timber or lumber cut by grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th April next, be secured by good endorsed notes, or other sufficient security to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the afore-mentioned premises, wherever and however it may be situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash; and, after deducting reasonable expenses, commissions, and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damages." For securing the stumpage payable to respondents under this license, C. & S. gave to the respondents a draft upon J. & Co., which was accepted by J. & Co., and approved of by the respondents, but which was not paid at maturity. After giving the draft C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land

Agreement—Continued.

under the said agreement. J. & Co. failed, and appellant, their assignee, took possession of the lumber and sold it.

Held, *Per Strong, Taschereau and Gwynne, JJ.*, (affirming the judgment of the court below), Ritchie, C.J. and Fournier and Henry, JJ., dissenting, that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to C. & S. immediately upon the receipt by the company of the accepted draft of C. & S. on J. & Co., and that appellant was liable for the actual payment of the stumpage.

McLeod v. The New Brunswick Railway Company.—v. 281.

5. Conditional agreement to take stock.

See CORPORATIONS, 8.

6. *Construction of—Evidence—Question for the jury—Contract not under seal.*

To an action on the common counts brought by T. & W. M. against the C. C. R. Co., to recover money claimed to be due for fencing along the line of C. C. railway, the C. C. R. Co. pleaded never indebted and payment. The agreement under which the fencing was made is as follows:—"Memo. of fencing between Muskrat river, east, to Renfrew. T. & W. M. to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for \$1.25 per rod, company to furnish cars for lumber." Signed "T. & W. M.," and "A. B. F."

F. controlled nine-tenths of the stock, and publicly appeared to be and was understood to be, and acted as, managing director or manager of the company, although he was at one time contractor for the building of the whole road. T. & W. M. built the fence and the C. C. R. Co. have had the benefit thereof ever since. The case was tried before Patterson, J. and a jury and on the evidence, in answer to certain questions submitted by the judge the jury found that T. & W. M., when they contracted, considered they were contracting with the company through F., and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments made were as money which the company owed, not money which they were paying to be charged to F., and a general verdict was found for T. & W. M. for \$12,218.51.

On appeal to the Supreme Court of Canada, Held, (affirming the judgment of the court below) that it was properly left to the jury to decide whether the work performed, of which the C. C. R. Co. received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence; (Ritchie, C.J. and Taschereau, J., dissenting, on the ground that there was no evidence that F. had any authority to bind the company, T. & W. M. being only sub-contractors, nor evidence of ratification.) 2. That although the contract entered into by F. for the company was not under seal, the action was maintainable.

Canada Central Railway Company v. Murray—viii. 318.

Agreement—Continued.

[In this case the Judicial Committee of the Privy Council refused leave to appeal.

Application refused on the ground that the question raised involved no issue except an issue of fact; and that the judges below had differed upon a question of fact in regard to an ordinary contract of employment did not seem to be any reason for permitting an appeal, having regard to the terms of the statute which now regulates these appeals.

Their Lordships also stated that they were desirous in this case "to lay down the rule that they will in future expect parties who are petitioning for leave to bring an appeal before this Board to state succinctly, but fully, in their petition the grounds upon which they make that demand. They certainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings, over which this Board, until an appeal is permitted and the papers are sent to England by the proper authorities, have no control, and which they cannot accept on an *ex parte* statement, which an application of this kind is."

8. App. Cases 874.—30th June, 1888.

7. *To pledge moneys by a debtor—Validity of—Articles 1966, 1969, 1970, C. C.*

G., in 1878, being unable, on account of depression in business, to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims, showing a surplus of \$6,000, after deduction of his bad debts. The creditors consented to grant his request, and agreed to accept G.'s notes at 4, 8, 12 and 16 months, on condition that the last of them should be endorsed to their satisfaction. N. (the respondent) agreed to endorse the last notes on condition that G. should deposit in a bank in his (N.'s) name \$75 per week to secure him for such endorsement, and G. signed an agreement to that effect. Thereupon N. endorsed G.'s notes to an amount of over \$4,000, and they were given to G.'s creditors. On 31st July, 1879, G., after having deposited \$2,007.87 in N.'s name in the Ville Marie Bank, failed, and N. paid the notes he had endorsed, partly with the \$2,007.87. B., as assignee of G., brought an action against N., claiming that the payments made to N. by G. were fraudulent, and praying that the money so deposited might be reimbursed by N. to B., for the benefit of all G.'s creditors.

Held, (affirming the judgment of the Court of Queen's Bench, Ritchie, C.J. and Fournier, J., dissenting), that the arrangement between G. and N. by which the moneys deposited in the bank by G. became pledged to N., was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstraction of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of G.'s assets in furtherance and not in contravention of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference.

Beausoleil v. Normand.—ix. 711.

Agreement—Continued.

8. With Government of Canada for continuous possession of railroad—Construction of.

See PETITION OF RIGHT, 15.

9. For advances to get out timber.

See LIEN, 2.

10. *Agreement to insure ship to amount of advances — 37 V. c. 15, (Q.)—Continuance of cause under, so as to suspend prescription.*

Appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment rendered by the Superior Court, at Quebec, on the 19th of May, 1883, condemning the respondents, as representatives of the late firm of George Burns Symes & Co., to pay the appellant a sum of \$20,491.74, with interest from the 13th of July, 1876, and costs. The claim arose out of an alleged breach of contract by Symes & Co., in not insuring according to agreement to the full extent of their advances thereon the ship "Empress Eugenie," belonging to the appellant, the loss of which entailed upon him heavy damages. The facts of the case may briefly be stated as follows:—For several years previous to 1857, the firm of Symes & Co. had large dealings with the appellant, consisting principally in advances, which they made to the appellant on the security of ships, which the latter, a shipbuilder, constructed and disposed of through them. During the course of such transactions, on the 18th of August, 1854, the appellant assigned to Symes & Co. the ship "Empress Eugenie," together with the freights and earnings of the vessel, for £18,500, in trust, to sell her at such time and place as they might judge best; to receive the price and earnings thereof; and out of the moneys arising from such sale, freight, earnings or hire, or otherwise coming into their hands on account of the appellant, to retain so much thereof to pay the said sum of £18,500, and all other sums then due to them by the appellant, or which they might thereafter pay, lay out or advance for him, and all other moneys due for charges, expenses, interest and commission, as specified in the deed. It was also stipulated in the deed that the said vessel and her freights should at all times be kept insured by the said George Burns Symes & Co. to at least the full amount of the advances made by them in respect thereof, and to such further reasonable amount as the appellant might see fit, the premiums of such insurances to be deducted from the moneys arising out of the premises.

The "Empress Eugenie" left the port of Quebec for Liverpool with a full cargo, but owing to the depressed state of the market she could not be sold, and it was agreed that she should be classed and coppered, in order that she might be run with freight until a more favorable opportunity occurred to dispose of her. While the vessel was at Liverpool expenses were incurred by Symes & Co., with the assent of the appellant, to the amount of \$41,003.67 for classing and coppering the vessel, as well as for discharging and loading her. In the meantime Symes & Co. received \$22,001.29 for freight earned by the "Empress Eugenie" on her voyage to Liverpool, and sums derived from other

Agreement—Continued.

sources, amounting in all to \$48,882.86, which, according to the deed of the 18th of August, 1854, they were entitled to place to the credit of their advances on the "Empress Eugenie." The vessel, after being classed and coppered, was insured for \$68,000, and left Liverpool in destination for the port of Quebec with a cargo, the freight of which was valued at \$7,600, and insured for that sum. She was lost on her voyage. Symes & Co. credited the amount received to the appellant, and in 1857 they brought an action against him for a balance of £2,929 4s. 9d. on their general account.

The appellant contested the account, and pleaded that Symes & Co. had neglected to insure the "Empress Eugenie" to the full extent of their advances, and that he had thereby lost a large sum of money, exceeding the amount which they claimed from him and which was thereby compensated, and he prayed that the action be dismissed. The appellant made no incidental demand.

In 1873, while the case was still pending, the record was destroyed by the burning of the Quebec court house. More than two years after, the appellant petitioned under the Quebec Statute 37 V. c. 15, for leave to recommence the proceedings, which was granted to him, and he instituted the present action against the respondent as representing George Burns Symes and David Douglas Young, who had composed the late firm of Symes & Co., and were then deceased.

The majority of the Court of Queen's Bench for Lower Canada were of opinion that the demand of the appellant, not having been made in the first case, could not be deemed to be a recommencing of the cause or proceeding of which the record was burned within the meaning of 37 V. c. 15 (Q.), and was not a continuance of said cause or proceeding so as to suspend prescription within the meaning of sections 7 and 21 of that Act. But the court did not consider it necessary to enter into the consideration of the question of prescription, preferring to rest their judgment on the broader ground that the respondents were only bound to insure for the amount of their claim.

On appeal to the Supreme Court of Canada, Held, *Per Ritchie, C.J.*, and Strong and Gwynne, JJ., affirming the judgment of the Court of Queen's Bench, (Fournier and Henry, JJ., dissenting), that the amount for which Symes & Co. were bound to insure the ship under the agreement was the amount of any balances which at any time might be due to them by appellant for moneys paid or laid out and expended by them on account of appellant with reference to the ship, viz., for the amount of moneys for which the ship was liable to them under the deed, and not for the cost of said ship, or the aggregate amount of all advances which they might have made, irrespective of the sums received by them to be applied on account of such advances. Appeal dismissed with costs.

Gingras v. Symes.—12th January, 1885.

11. Construction of—Estoppel—Misrepresentation.

G. M., a man of education, well acquainted with commercial business, executed a bond to pay certain sums of money, in certain events, to the Merchant's Bank of Canada. By an agreement, bearing even date with the bond, it was recited *inter alia* that, in consideration of a mortgage granted to

Agreement—Continued.

the bank by M. Bros. & Co., the bank had agreed to make further advances to M. Bros. & Co., joint obligors with G. M., and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to the bank, G. M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over-valuation of the property embraced in the mortgage, and not otherwise. The bank, the plaintiffs, made no representations whatever to the defendants.

Held, affirming the judgment of the Chancery Division of the High Court of Justice for Ontario (Gwynne, J., dissenting), that G. M. was bound by the execution of the documents, and was liable upon them according to their tenor and effect.

Moffatt v. Merchants Bank of Canada.—xi. 46.

[The Judicial Committee of the P. C. refused leave to appeal in this case.]

12. Between agent of vendor and purchaser—Delivery of deed—Agent exceeding authority.

See AGENT, 11.

13. *Agreement with municipality—Construction of tramway—Traction engine—Agreement to withdraw and discontinue use—Includes steam engine.*

An agreement was entered into under the authority of an Act of the Legislature of Ontario, between the municipality of York and the Toronto Gravel Road Co., for a right to construct a tramway from their gravel pits to the city of Toronto. One of the clauses of the agreement was as follows:—“So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highway of the said county, and shall discontinue the use and employment of the said traction engine, or of any other traction engine, upon or along such public highways.” The company claimed the right to put steam engines upon the road, over such public highway, notwithstanding the above clause in their agreement.

Held, (affirming the judgment of the Court of Appeal, 11 Ont. App. R. 765) that the use of steam engines was an infraction of the said clause.

Toronto Gravel Road Co. v. County of York.—16th Nov. 1885.—xii. 517.

14. To purchase railway—Contract for hire—Rolling stock—Reference to arbitration—R. S. O. c. 50, s. 189.

See RAILWAYS AND RAILWAY COMPANIES, 89.

Agreement—Continued.

15. Street railway—Provision in by-law and agreement pursuant thereto for assuming ownership by corporation of city upon giving six months previous notice, construction of.

See CORPORATIONS, 39.

16. *Written instrument—Collateral parol agreement—Admissibility of evidence of—Work and labor—Security—Lien.*

By an agreement in writing B. contracted to cut for A. a quantity of wood and haul and deliver the same at a time and to a place mentioned, B. to pay for the same on delivery. The agreement made no provision for securing to A. the payment of his labor, but when it was drawn up there was a verbal agreement between the parties that in default of payment by B. the wood could be held by A. as security and be sold for the amount of his claim.

Held, reversing the judgment of the court below, Henry, J., dissenting, that evidence of this verbal agreement was admissible on the trial of an action of replevin for the wood by an assignee of A., and that its effect was to give B. a lien on the wood for the amount due him.

Byers v. McMillan.—xv. 194.

17. Agreement between two persons to buy mining land on speculation—Renewal of agreement from time to time—Secret agreement with third person by one partner—Relation back of sale to date of first agreement.

See PARTNERSHIP, 11.

18. User of land—Way of necessity—License—Construction of agreement.

See EASEMENT, 6.

19. Written agreement—Intoxication of party executing—Consideration.

See EVIDENCE, 5.

20. To operate lines of telegraph—*Trouble de droit*—Lessor and lessee—Claim for reduction of rent—Trespass—Arts. 1612, 1614, 1618, C. C.

See LEASE, 12.

21. To manage tug on commission—Special contract for rescue of tug—Action by agents of owner for salvage.

See MARITIME COURT OF ONTARIO, 7.

22. *Manufacture of patented articles—Substitution of new agreement for—Evidence.*

B. was the patentee of a machine called the Windsor loom, for making skirtings, etc., and in 1884, she entered into an agreement with the defendant

Agreement—Continued.

company to supply them with the looms, on which they were to manufacture the goods and pay a royalty of one cent a square yard thereon, the minimum sum for such royalty to be \$50 a month. The patent of B. was to expire in 1891. Prior to this agreement, in 1882, B. had granted to P., the head of the defendant company a license to manufacture blankets under another patent for a like royalty. These agreements were carried out until 1887. In the meantime B. had patented another device for making blankets, and considerable correspondence had taken place between her and the company with regard to the manufacture of the latter patented article, and the company, who had been unable to sell the skirtings, offered to take both patents for a year, paying therefor \$1,000 royalty, which B. accepted. At the end of the year B. claimed that the original agreement was still in force and was to continue until the patent expired, and she brought an action for royalties due her under the same.

Held, reversing the judgment of the Court of Appeal for Ontario, Taschereau, J., dissenting, that the correspondence and other evidence showed that the agreement made in 1887 was in substitution for and superseded the original agreement, and B. had no right to claim any royalty under the latter.

Penman Manufacturing Co. v. Broadhead.—June 28, 1892,—xxi.

23. Fire Insurance—Insurable interest—Property in Goods—Construction of agreement to cut ice—Statement in application—Warranty or representation—Breach of condition—Evidence.

See INSURANCE, FIRE, 27,
CONTRACT.

Amendment—Right to order, under Administration of Justice Act Ont. sec. 50.

See MORTGAGE, 9.

2. Power of Supreme Court as to.

See CONTRACT, 14.

3. Of pleadings—Motion for, rejected by Superior Court, L. C.—Insufficiency of affidavit—Procedure—Refusal of Supreme Court to interfere.

See JURISDICTION, 35.

4. Of pleadings, by Supreme Court, to make them conform to Evidence.

See LICENSE, 7.

5. Of case on appeal to Supreme Court.

See PRACTICE OF SUPREME COURT.

Amiables Compositeurs—Submission to—Award—Finality of—Art. 1346, C. C. P.

See ARBITRATION AND AWARD, 24.

Annuities—Sale of *corpus* to pay.

See WILL, 5.

Appeal—Jurisdiction of Supreme Court of Canada in.

See JURISDICTION.

2. Court of, right of, to entertain question not raised at the trial.

See WILL, 2.

3. Objection not raised by pleadings—Not open on appeal.

See BENEFIT SOCIETY.

4. *On questions of fact—Conflicting evidence—Duty of Appellate Court.*

Held, where a disputed fact, involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not reverse the decree of the judge of the court below, merely upon a balance of testimony.

The Platon.—iv. 648.

5. **Held**, a court of appeal should not reverse the finding upon matters of fact of the judge who tried the cause and had the opportunity of observing the demeanor of the witnesses, unless the evidence be of such a character as to convey to the mind of the judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous. *Per Gwynne, J.*

Ryan v. Ryan.—v. 406.

6. **Held**, where there is a direct conflict of testimony, the finding of the Judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *Per Strong, J.*

Grassett v. Carter.—x. 105.

7. **Held**, a court of Appeal ought not to differ from court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. *Per Ritchie, C.J.*

Jones v. Tuck.—xi. 197.

8. **Held**, where questions to be decided by court of first instance were purely of fact, its judgment should be affirmed.

See APPEAL, 20, 66.

ARBITRATION AND AWARD, 18.

ELECTION, 12, 19, 20.

EVIDENCE, 58.

RAILWAYS AND RAILWAY COMPANIES, 28.

TRUSTS AND TRUSTEES, 22.

WILL, 7.

Appeal—Continued.

9. Where verdict affirmed by two courts on the weight of evidence, the second appellate court should not interfere.

See EVIDENCE, 21.

HUSBAND AND WIFE, 7.

SALE OF GOODS, 14.

[See *Allen v. Quebec Warehouse Co.*, 12 App. Cases 101.]

10. Additional objection to award cannot be taken on appeal.

See ARBITRATION AND WARD, 8.

11. *Documents not proved or produced at trial—Inadmissible on appeal.*

Held, that a document which has not been proved nor produced at the trial cannot be relied on or made part of the case in appeal.

Lionais v. Molson's Bank.—x. 526.

Montreal Loan and Mortgage Co. v. Fautaux.—iii. 411.

12. Per saltum, when allowed.

See PRACTICE OF SUPREME COURT.

13. In criminal cases.

See CRIMINAL APPEAL.

14. In controverted elections.

See ELECTION.

15. From Maritime Court of Ontario.

See MARITIME COURT OF ONTARIO.

16. Where new trial ordered.

See JURISDICTION, 39.

17. *Direct from Equity Court—C. S. C. c. 135, s. 26—Special circumstances — Practice — Judgment of Privy Council—Repayment of costs.*

An appeal came before the Supreme Court, by consent, from the decision of the Judge in Equity of New Brunswick, without an intermediate appeal to the Supreme Court of the province, and, after argument, was dismissed. The judgment of the Supreme Court was subsequently reversed by the Privy Council, and the case sent back to the Judge in Equity to make a decree. The plaintiffs being dissatisfied with the decree pronounced by the Judge in Equity applied for leave to appeal direct under R. S. C. c. 135, s. 26, therefrom.

Held, *Taschereau* and *Gwynne, JJ.*, dissenting, that under the circumstances of the case such leave should be granted.

Where a judgment of the Supreme Court of Canada has been reversed by the Privy Council the proper manner of enforcing the judgment of the

Appeal—Continued.

Privy Council is to obtain an order making it a rule of the Supreme Court of Canada.

Where such judgment of the Privy Council was made a rule of court, the court ordered the repayment by one of the parties of costs received pursuant to the judgment so reversed.

Lewin v. Howe.—xiv. 722.

18. *Death of party—Suggestion—Judgment nunc pro tunc—Solicitor—Authority to bind client.*

Where the losing party in a suit died after verdict and before judgment on a rule for a new trial, and judgment *nunc pro tunc* was entered, by order of a judge, as of a day prior to his death and a suggestion of the death entered on the record, the court refused to quash an appeal by his executors.

A promise of indemnity to the sheriff by an attorney is binding on his client where the attorney had the conduct of the suit in the course of which such promise was made and the subsequent acts of the client showed that he had adopted the attorney's proceedings.

[Affirming the judgment of the Supreme Court of New Brunswick, 25 N. B. Rep. 196.]

Muirhead v. Shirreff.—Nov. 8, 1886.—xiv. 735.

19. *Petition of right—46 V. c. 27 (Q.)—Appeal to Supreme Court of Canada.*

The provisions of the Supreme and Exchequer Courts Acts relating to appeals from the province of Quebec, apply to cases arising under the Petition of Right Act of that province, 46 V. c. 27.

McGreavy v. The Queen.—Nov. 8, 1886.—xiv. 735.

20. *Questions of fact—Petition of Right Act, (P.Q.)*

Where a judgment appealed from is founded wholly upon questions of fact the Supreme Court of Canada will not reverse it unless convinced, beyond all reasonable doubt, that such judgment is clearly erroneous.

Judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirmed.

This was a case instituted under the Petition of Right Act of the Province of Quebec and the court affirmed its ruling in *McGreavy v. The Queen*, (*see Appeal*, 19) that the provisions of the Supreme and Exchequer Courts Act relating to appeals from the Province of Quebec apply to such cases.

Arpin v. The Queen.—Dec. 7, 1886.—xiv. 736.

21. *Award of official arbitrators—42 V. c. 8, s. 38—Right to review award of arbitrators on appeal.*

See ARBITRATION AND AWARD, 18.

22. *No appeal to the Supreme Court in proceedings by quo warranto.*

See QUO WARRANTO.

Appeal—Continued.**23. Master's report—Excess of authority.**

A decision of the Supreme Court of Nova Scotia, 19 N. S. Rep. 341, confirming the report of a master on a reference, reversed on the ground that the master had exceeded his authority and reported on matters not referred to him,

Doull v. Mellreith.—May 2, 1887.—xiv. 739.

24. S. & E. C. Act, s. 29 (b)—Procès Verbal by Municipal Council ordering improvement of road—Future Rights.

See CORPORATIONS, 37.

25. Capias—Petition to be discharged—Final judgment in a judicial proceeding.

See JURISDICTION, 52.

26. Appeal direct from Divisional Court of Ontario—Special circumstances—Decision of Court of Appeal on abstract question of law—S. & E. C. Act, R. S. C. c. 135, s. 26.

See PRACTICE OF SUPREME COURT, 12.

27. Notice of—Rules of Maritime Court—Effect of—R. S. C. c. 137, ss. 18 and 19—Judgment of Surrogate—Pronouncing of—Entry by Registrar.

Rule 269 of the rules of the Maritime Court of Ontario requires notice of appeal from a decision of that court to the Supreme Court of Canada to be given within fifteen days from the pronouncing of such decision. A judgment of the Maritime Court was handed by the surrogate to the registrar, but not in open court, and was not drawn up and entered by the registrar for some time after.

Held, Taschereau, J., *dubitante*, that notice of appeal within fifteen days from the entry of such judgment was sufficient under the said rules.

Quære, is such rule 269 *intra vires* of the Maritime Court?

Robertson v. Wigle.—xv. 214.

[But see now 54-55 V. c. 29 (D.) transferring the jurisdiction of the Maritime Court of Ontario to the Exchequer Court of Canada.]

28. Contempt of Court—Discretion—R. S. C. c. 135, s. 24 (a)—Final judgment.

See JURISDICTION, 53.

29. Action for balance of one of several money payments of \$2,000 each—Future Rights not bound—S. & E. C. Act, R. S. C. c. 135, s. 29, s-s (b)—No jurisdiction.

See JURISDICTION, 54.

Appeal—Continued.

30. Contempt of court—Constructive contempt—Discretion of court—Prejudice to suitor—*Locus standi*—Jurisdiction—S. & E. C. Act, R. S. C. c. 135, s. 24, (a); s. 26, s-s. 1; s. 27.

See JURISDICTION, 55.
CONTEMPT, 5.

31. Right of appeal, P. Q.—Amount in controversy—S. & E. C. Act, R. S. C. c. 135, s. 29, construction of—Jurisdiction.

See JURISDICTION, 56.

32. Right of appeal, P. Q.—Amount in controversy—Judicial deposit by insurance company—Rival claims as to same—S. & E. C. Act, R. S. C. c. 135, s. 29.

See JURISDICTION, 57.

33. *Habeas corpus* case—First step, the filing of the case in appeal with the Registrar.

See JURISDICTION, 58.

34. Right of appeal, P. Q.—Special assessment for drain by municipality—Exemption—Educational institution—Future rights—S. & E. C. Act, R. S. C. c. 135, s. 29 (b).

See ASSESSMENT AND TAXES, 18.
JURISDICTION, 59.

35. Right of appeal, P. Q.—S. & E. C. Act, R. S. C. c. 135, s. 29 (b)—Ferry—Interference with—Future rights.

See JURISDICTION, 60.

36. Security for costs—Right to benefit of—*Capias*—Bail, order for discharge of—A matter of practice in discretion of court below—Jurisdiction.

See JURISDICTION, 61.

37. Expropriation of land—Order by judge in chambers as to moneys deposited—S. & E. C. Act, R. S. C. c. 135, s. 28—43 V. c. 9, s. 9, s-s. 31—*Persona designata*—R. S. C. c. 109, s. 88, s-s. 26 and 31.

See JURISDICTION, 62.

38. Motion for new trial—Refusal of Court of Appeal to interfere, the circumstances being peculiar—Jurisdiction—S. & E. C. Act, R. S. C. c. 135, s. 24 (d)—Costs.

See JURISDICTION, 63.

Appeal—Continued.

39. Action to recover penalties for bribery—R. S. Q. Art. 429—
Future rights—S. & E. C. Act, R. S. C. c. 135, s. 29 (b)—
Collateral matter—Jurisdiction.

See JURISDICTION, 64.

40. Railway accident—Action of damages—Death of plaintiff—
Abatement of action—*Actio personalis moritur cum persona*—
Lord Campbell's Act—C. S. N. B. c. 86.

See ACTION, 5.

41. Action for small amount—*Propriety of appeal in.*

Although the court cannot refuse to hear an appeal in a case in which only twenty-two dollars is involved, yet the bringing of appeals for such trifling amounts is objectionable and should not be encouraged.

McDonald v. Gilbert.—xvi. 700.

42. Final judgment—Judgment on demurrer to replication to plea not deciding any part of action—Jurisdiction.

See JURISDICTION, 67.

43. Supreme Court of the N. W. T.—Appeal from Court of Revision to—Origin of proceedings—S. & E. C. Act, R. S. C. c. 135, s. 24—51 V. c. 37, s. 3 (D.)

See JURISDICTION, 68.

44. Award of official arbitrators—Compensation for land taken by expropriation—Duty of appellate court.

See ARBITRATION AND AWARD, 17.

45. Judgment dismissing petition to set aside judgment in action to realize mechanics' lien—No jurisdiction—Discretion of Court or Judge—S. & E. C. Act, R. S. C. c. 135, s. 24 (a) and s. 27.

See JURISDICTION, 69.

46. Award of official arbitrators—Expropriation—Appreciation of evidence—Weight of evidence—Appeal to Supreme Court.

See ARBITRATION AND AWARD, 18.

47. Action for partition and licitation of property—Partnership—Plaintiff's interest less than \$2,000—S. & E. C. Act, R. S. C. c. 135, s. 29.

See JURISDICTION, 70.]

Appeal—Continued.

48. Judgment of Q. B. L. C. quashing writ of appeal as issued contrary to Art. 1116, C. C. P.—Not a final judgment from which appeal will lie—Amount in controversy—Ss. 28 & 29 S. & E. C. Act, R. S. C. c. 135.

See JURISDICTION, 71.

49. The Ontario Judicature Act, 1881, s. 43, limiting appeals to the Supreme Court is *ultra vires* of the provincial legislature.

See LEGISLATURE, 17.

50. Judgment on motion for non-suit or new trial—Notice of appeal—S. & E. C. Act, R. S. C. c. 135, ss. 41, 42—Extension of time for giving notice—Application after time expired.

See JURISDICTION, 73.

51. Judgment on motion for new trial—Construction of—S. & E. C. Act, R. S. C. c. 135, s. 24 (d)—Non-jury case.

See JURISDICTION, 74.

52. *Court of Appeal—Functions of—Difference between jury and and non-jury cases.*

Held, per Strong J. An appeal court exercises different functions in dealing with a case tried by a judge without a jury from those exercised in jury cases. In the former case the court has the same jurisdiction over the facts as the trial judge, and can deal with them as it chooses. In the latter the court cannot be substituted for the jury to whom the parties have agreed to assign the facts for decision.

Phoenix Insurance Co. v. McGhee.—xviii. 61.

See INSURANCE, MARINE, 80.

53. *Jurisdiction—Amount in controversy—Supreme and Exchequer Courts Act, c. 135, s. 29—Damages—Discretion of court of first instance as to amount.*

Where the plaintiff in an action for \$10,000 for damages obtains a judgment in the Superior Court for Lower Canada for \$2,000, and the defendant appeals to the Court of Queen's Bench, where the judgment is reduced below said amount of \$2,000, the case is appealable by the plaintiff to the Supreme Court, the value of the matter in controversy as regards him being the amount of the judgment of the Superior Court (Taschereau and Patterson, JJ., dissenting).

The amount of damages awarded by the judge who tries the case in his discretion in the court of first instance, should not be interfered with by a court of appeal, unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the judge. *Levi v. Reed*, 6 Can. S. C. R. 482, and *Gingras v. Desilets*, Dig. "Damages," 23, followed.

Cossette v. Dun.—xviii. 222.

Appeal—Continued.

54. Validity of by-law—S. & E. C. Act, R. S. C. c. 135, ss. 24 (g), 29 (a) and (b) and 30—Constitutional question not involved in appeal—Jurisdiction.

See JURISDICTION, 76.

55. Mandamus, proceedings on—Interlocutory judgment in, not appealable—S. & E. C. Act, R. S. C. c. 135, s. 24 (g)—The word "judgment" in that sub-section means final judgment.

See JURISDICTION, 77.

56. Order for a new trial—Insufficient answer by jury to one of the questions—Not a final judgment—S. & E. C. Act, R. S. C. c. 135, ss. 24 (g) 30 and 61.

See JURISDICTION, 78.

57. Judgment directing petition contesting seizure to be proceeded with at same time as main action—Not appealable—S. & E. C. Act, R. S. C. c. 135, ss. 24 and 28.

See JURISDICTION, 79.

58. New trial ordered by court of Q. B. L. C. *suo motu* on ground that assignment of facts and answers of jury insufficient—Not a final judgment—S. & E. C. Act, R. S. C. c. 135, ss. 24, 27, 28, 29, 30 and 61.

See JURISDICTION, 80.

59. Application to judge in chambers to set aside a writ of summons—Not a final judgment.

See JURISDICTION, 81.

60. Questions of fact—Findings of trial judge—Interference with.

See EVIDENCE, 49.

61. Evidence tendered on trial—Grounds urged for admissibility—New grounds urged on appeal.

See EVIDENCE, 51.

62. Insolvent Act of 1875—40 V. c. 41, s. 28—Right of appeal taken away by.

See JURISDICTION, 82.

63. Title to land—S. & E. C. Act, R. S. C. c. 135, s. 29 (b)—Arts. 857 and 887, C. C. P.—Art. 1624, C. C.—Jurisdiction.

See JURISDICTION, 83.

Appeal—Continued.**64. Finding of courts below—Questions of fact—Interference with.**

See EVIDENCE 58.

65. Solicitor—Bill of costs—Reference to taxing master—Procedure.

It is doubtful if a decision affirming the master's ruling on taxation of a solicitor's bill of costs, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court.

O'Donohoe v. Beatty.—xix. 356.

And see SOLICITOR AND CLIENT, 7.

66. Question of fact—Finding of trial judge affirmed by Court of Appeal.

Held, Strong, J., dissenting, that the questions raised were entirely matters of fact, as to which the decision of the trial judge who saw and heard the witnesses, confirmed as it was by the Court of Appeal for Ontario should not be interfered with.

Bickford v. Hawkins.—xix. 362.

67. By-law, repealed before appeal brought from judgment on motion to quash—Appeal as to costs—Jurisdiction—S. & E. C. Act, R. S. C. c. 135, s. 21.

See JURISDICTION, 85.

68. Jurisdiction—Action to set aside a *procès-verbal* or by-law—Appeal—S. 24 (g) and s. 29 of the Supreme and Exchequer Courts Act.

The municipality of the County of Verchères passed a by-law or *procès-verbal* defining who were to be liable for the rebuilding and maintenance of a certain bridge. The municipality of Varennes by their action prayed to have the by-law or *procès-verbal* in question set aside on the ground of certain irregularities. The action was maintained and the by-law set aside. On appeal to the Supreme Court of Canada :

Held, that the case was not appealable and did not come within s. 29 or s. 24 (g) of the Supreme and Exchequer Courts Act, no future rights within the meaning of the former section being in question, and the appeal not being from a rule or order of a court quashing or refusing to quash a by-law of a municipal corporation.

County of Verchères v. The Village of Varennes.—xix. 365.

69. Jurisdiction—Future rights—Servitude—S. & E. C. Act, R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 87.

Appeal—Continued.

70. Expropriation for railway purposes—R. S. Q. Art. 5164, ss. 12, 16, 17, 18, 24—Award—Action to set aside—Amount in Controversy—Interest—Costs—Jurisdiction.

See JURISDICTION, 88.

71. Final judgment—Specially endorsed writ—Order allowing judgment to be signed—Practice—Jurisdiction.

See JURISDICTION, 89.

72. *Election petition—Appeal—Dissolution of Parliament—Return of deposit.*

In the interval between taking of an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sittings (1891) of the Supreme Court of Canada, parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs, moved before a judge of the Supreme Court in chambers (the full court having referred the motion to a judge in chambers) to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below. The petitioner asserted his right to have his deposit returned to him.

Held, per Patterson, J., that the final determination of the right to costs being kept in suspense by the appeal the motion should be refused.

Held, also, inasmuch as the money deposited in the court below ought to be disposed of by an order of that court the registrar of this court should certify to the court below that the appeal was not heard, and that the petition dropped by reason of the dissolution of Parliament on the 2nd February, 1891.

Halton Election Case. Lush v. Waldie.—xix. 557.

[In this case the petitioner subsequently moved before the Supreme Court of Canada for an order directing the repayment to him of the \$1000 and \$100 respectively deposited in the court below as security for costs. The petitioner shewed that he had made an application to obtain these moneys to the Chief Justice of the Q. B. D. of the H. C. of J. for Ontario, which application had been dismissed. The Supreme Court thereupon declared that the petition having been held to be abated by the Hon. Mr. Justice Patterson and his order not having been appealed from, the petitioner was therefore entitled to be paid the said sums.—15th March, 1898.]

73. *Supreme and Exchequer Courts Amending Act, 1891, 54-55 V. c. 25, s. 3—Appeal from Court of Review.*

By section 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court in Review, Province of Quebec, in cases which, by the law of that Province, are appealable direct to the Judicial Committee of the Privy Council.

Appeal—Continued.

A judgment was delivered by the Superior Court in Review at Montreal in favour of D., the respondent, on the same day on which the Amending Act came into force.

On an appeal to the Supreme Court of Canada taken by the appellants—

Held, that the appellants not having shown that the judgment was delivered subsequent to the passing of the Amending Act the court had no jurisdiction.

Quere, whether an appeal will lie from a judgment pronounced after the passing of the Amending Act in an action pending before the change of the law.

Hurtubise v. Desmarteau.—xix. 562.

74. Order restraining action with liberty to apply—Judicial discretion—Final judgment—Jurisdiction—S. & E. C. Act., R. S. C. c. 135, ss. 2 (e) and 27.

See JURISDICTION, 91.

75. *Leave to appeal—Winding-up Act—Leave granted after argument of case.*

After a case under the Winding-up Act was argued, the appellant, with the consent of the respondent, obtained from a judge of the court below an order to extend the time for bringing the appeal, and subsequently, before the time expired, he got an order from the registrar of the Supreme Court, sitting as a Judge in Chambers, giving him leave to appeal in accordance with section 76 of the Winding-up Act, and the order declared that all the proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal.

Ontario Bank v. Chaplin.—xx. 152.

76. Trust not expressed in deed—Parol evidence of—Enforcement of—Findings of fact by trial judge affirmed by full court not interfered with on appeal.

See TRUSTS AND TRUSTEES, 22.

77. Action for call of \$1,000—Future rights—S. & E. C. Act, R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 92.

78. Tax on Bell Telephone Co. and on Quebec Gas Co.—By-law—Action to set aside—Jurisdiction—S. & E. C. Act, R. S. C. c. 135, s. 24 (g).

See JURISDICTION, 93.

79. Acquiescence in judgment—Intervention—Abandonment of appeal by not appealing to intermediate Court of Appeal.

See JURISDICTION, 94.

Appeal—Continued.

80. Election trial—Decision—Inferences from evidence.

See ELECTION, 44.

81. Acquiescence in judgment—Attorney *ad litem*, has no authority by agreement with attorney of opposite party to bind his client not to appeal.

See JURISDICTION, 95.

82. Election case—Notice of trial—Sufficiency of, under R. S. C. c. 9, s. 31—Not an objection to be relied on in appeal under s. 50 (b) of said statute.

See ELECTION, 46.

83. Jurisdiction—Action in disavowal—Prescription—Appearance by attorney—Service of summons—C. S. L. C. c. 83, s. 44.

In an action brought in 1866 for the sum of \$800 and interest at 12½ per cent. against two brothers J. S. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of J. S. D., at Three Rivers, the other defendant W. McD. D., then residing in the state of New York. On the return of the writ, the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken and in December, 1880, upon the issue of an *alias* writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J. S. D., saying: "Be so good as to file an appearance in the case to which the inclosed has reference, etc.," and also pleaded prescription, ratification and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed.

On appeal to the Supreme Court of Canada the respondent moved to quash the appeal on the ground that the matter in controversy did not amount to the sum of \$2,000.

Held, that as the judgment obtained against the appellant in March, 1874, on the appearance filed by the respondent, exceeded the amount of \$2,000, the judgment on the petition for disavowal was appealable.

Held, also, that where a petition in disavowal has been served on all parties to the suit and is only contested by the attorney, whose authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal.

Dawson v. Dumont.—xx. 709.

84. In Election Case—Giving notice of consent to reversal of judgment—R. S. C. c. 135, s. 52—Practice.

See ELECTION, 47.

Appeal—Continued.

85. In election case—Serving notice of discontinuance—R. S. C. c. 135, s. 51—Practice.

See ELECTION, 48.

86. Order for new trial—Refusal of Supreme Court to interfere with, on appeal.

See NEW TRIAL, 33.

87. Expropriation of land for railway purposes — Refusal by Supreme Court to interfere with finding of judge of Exchequer Court as to amount of compensation.

See EXPROPRIATION, 18.

88. Fraudulent conveyance—Action to set aside by creditor—Amount in controversy—Jurisdiction—R. S. C. c. 135, s. 29.

See JURISDICTION, 97.

89. By-law of municipality as to repair of road—Jurisdiction—"Rights in future"—S. & E. C. Act, R. S. C. c. 135, s. 29.

See JURISDICTION, 98.

90. Monthly allowance of \$200 payable by executor—Amount in controversy—Jurisdiction—S. & E. C. Act, R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 99.

91. Application to be admitted as attorney—Appeal from refusal of court to grant—Security for costs—Final judgment—Jurisdiction.

See JURISDICTION, 100.

92. From report of taxing officer—Final judgment.

See JURISDICTION, 102.

93. Mining lands—*Bornage*—Injunction—Jurisdiction—R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 103.

94. Action *en reprise d'instance*—Art. 439 C. C. P.—Will—*Res judicata*—Final judgment—Art. 439 C. C. P.—R. S. C. c. 135, ss. 2, 24 and 28.

See JURISDICTION, 104.

95. From Court of Review under Supreme Court Amending Act, 1891, 54-55 V. c. 25, s. 3—Case argued and taken *en delibere*,

Appeal—Continued.

day Act passed—Amount in controversy under £500 stg.—Jurisdiction—Arts. 1178 and 1178 (a) C. C. P.

See JURISDICTION, 106.

96. Contempt of court—A criminal matter—Judgment in proceedings therefor—S. & E. C. Act, R. S. C. c. 135, s. 68—Jurisdiction.

See JURISDICTION, 107.

97. Extention of time for bringing—Judgment sending case to referees to ascertain damages—Judgment sustaining report—Appeal limited to.

See JURISDICTION, 108.

98. Withdrawal of case from jury—Reference to court by consent of parties with power to draw inferences of fact—The court made a private tribunal from which no appeal—Practice of Supreme Court of New Brunswick.

See JURISDICTION, 109.

99. Two election petitions filed against appellant—Refusal of court to postpone trial of one of said petitions because the two not bracketed together—No appeal—R. S. C. c. 9, ss. 30 & 50.

See JURISDICTION, 110.

Appropriation—Of dividend.

See CONTRACT, 5.

2. By debtor.

See PAYMENT, 5, 10.

Arbitration and Award — Award remitting back—The Land Purchase Act of 1875, P. E. I. s. 45.

Held, that by the statute passed by the Island legislature, which they had a right to pass, the award of the commissioners could not be quashed and set aside, or declared invalid and void, on an application made to the Supreme Court; but it could have been remitted back to the commissioners in the manner prescribed by the 45th section of the Act. The application for the rule in the court below not having been made within the proper time, nor according to the provisions of that section, the decision of that court is against the express words of the statute, and cannot be allowed to stand.

Kelly v. Sullivan.—i. 1.

2. *Award—Finality of—Finding specifically on each of the matters in difference.*

Plaintiffs brought ejectment to recover possession of certain lands in the parish of P. After cause was at issue, under a rule of reference, all

Arbitration and Award—Continued.

matters in difference were referred to arbitration, and the arbitrators were to have power to make an award concerning the glebe and church lands at P., and to make a separate award concerning the school lands at P. The powers of the arbitrators were to extend to all accounts and differences between the said parish and the late rector, and the defendant as executrix of said Rector, as also between the said defendant individually and the parish. The arbitrators made two awards. First, as to the school lands they awarded that the defendant was indebted to the plaintiffs, as such executrix, on the school moneys in the sum of \$1,400; that the defendant should pay that sum to the plaintiffs; and that judgment should be entered for the plaintiffs for that amount. Secondly, as to the glebe and church lands, they awarded that the plaintiffs were entitled to recover the lands claimed in the writ of ejectment, and ordered judgment in ejectment to be entered for the plaintiffs with costs of suit; and, after reciting that all the accounts respecting the receipt and disbursements of all moneys received from the interest, rent and sale of these lands by the late Rector, or his agents, or by the defendant as his executrix, were also referred to them, as well as all accounts and differences between the said parish and the defendant individually, they further awarded that the defendant should "pay to the plaintiffs the sum of \$1 in full of the same," saving and excepting the matters in controversy respecting the school lands, on which they had made a separate award; and that judgment should be entered for the plaintiffs for the said sum of \$1. They also awarded that the defendant should pay all costs of the reference and award.

Held, that the awards sufficiently specified the claims submitted, and the various capacities in which such claims arose. That the first award, being against the defendant in her representative capacity, could not be considered against her personally, and negatived any claim of that kind, and also was an adjudication against the defendant that she had assets; and that the finding in the second award, that the defendant should pay \$1, could be considered a finding as against her in her individual capacity for that sum, and, as to the claims of the plaintiffs against her for moneys received by her husband, or by her as his executrix, as a finding against the plaintiffs on their claim. That the part of the second award, directing payment of the costs of the reference and award was bad, but might be abandoned.

St. George's Parish v. King.—ii. 143.

3. *Award—Power of attorney to enlarge time for making—Appeal, additional ground on.*

In an action on contract, the matters in difference were, by rule of court, by and with the consent of the parties, submitted to arbitration. By the rule of reference the award was directed to be made on or before the 1st May, 1877, or such further or ulterior day as the arbitrators might endorse from time to time on the order. The time for making the award was extended by the arbitrators till the 1st of September, 1877. On the 31st August, 1877, the attorneys for plaintiff and defendants, by consent in writing, endorsed on the rule of reference, extended the time for making the award till the 8th September. On

Arbitration and Award—*Continued.*

the 7th September the arbitrators made their award in favor of the plaintiff for the sum of \$5,001.42, in full settlement of all matters in difference in the cause.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that where the parties, through their respective attorneys in the action, consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation to the extended period of the authority of the arbitrators, and therefore an award made within the extended period is an award made under the rule of reference, and is valid and binding on the parties. 2. That the fact of one of the parties being a municipal corporation made no difference. 3. That in Nova Scotia, where the rule *nisi* to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal.

Oakes v. The City of Halifax.—iv. 640.

4. Award—Effect of, on insurance claim.

See INSURANCE, MARINE, 3.

5. Award, dealing only with equity of redemption—*No notice to third arbitrator—Liberty to amend answer setting this up—No costs of appeal when objections taken for first time in appellate court.*

Bills filed to enforce awards and to recover moneys to be paid thereunder for lands taken by the Canada Southern Ry. Co. The facts connected with the making of the awards and the subsequent litigation will be found in 41 U. C. Q. B. 195, 28 U. C. C. P. 309, 5 Ont. App. R. 13, and 9 Ont. App. R. 310. The Canada Southern Ry. Co. appealed to the Supreme Court of Canada from the judgments of the courts below maintaining the awards. Before the Supreme Court, counsel for the appellants for the first time contended that, in the Norvell case the award was bad because the arbitrators had dealt only with the equity of redemption of the land owner, and that in the other cases the awards were bad on their face as being signed by only two of the three arbitrators without showing a notice to the third arbitrator.

Held, in the Norvell case, that the Canada Southern Ry. Co. should be allowed to amend their answer in the cause in the Court of Chancery as they might be advised, in order to show that the award was in respect only of the equity of redemption and not the fee simple, and upon such amendment being made the award should be declared null and void.

Held, in the other cases, that the Canada Southern Ry. Co. should be at liberty to amend their answer in order to show that the awards were made by two of the arbitrators in the absence of, and without notice of the meeting of the said two arbitrators to, the third arbitrator, with liberty to the plaintiffs to file with the registrar of the Supreme Court their signification of their desire for new trials, when such new trials should be granted without costs;

Arbitration and Award—Continued.

in default of such signification in any case the award was declared null and void.

Appeals allowed, but without costs, the objections having been taken for the first time on appeal.

Canada Southern Ry. Co. v. Norvell.—21st June, 1880.

"	"	v. Cunningham.
"	"	v. Duff.
"	"	v. Gatfield.

6. Award—Motion to set aside, too late—9 & 10 Wm. III. c. 15.

An appeal from the judgment of the Court of Appeal for Ontario by the appellant Bickford, who became plaintiff by order of revivor in a suit originally brought in the Court of Chancery for Ontario by one Ario Pardee against one Henry Crompton Lloyd for dissolution of partnership, and an account and winding up of the partnership dealings. A decree was made at the hearing of the cause, ordering, by consent of the parties, a reference to three arbitrators of the matters in difference in the cause. There was also a deed of submission, in the same terms as the decree, subsequently executed by the parties. An award was made and published by the arbitrators on the 13th August, 1878. The respondent Lloyd's solicitor, served on the 2nd day of September, 1878, a notice of appeal from the said award. The appellant's solicitor, on the 8th day of October, 1878, served a notice on the respondent's solicitor, consenting to an order being made setting aside the award. No action being taken thereon by the respondent, the appellant, on the 2nd day of December, 1878, served a notice of motion for an order to set aside the award for the reasons therein set forth. That motion was enlarged from time to time by and at the request of the respondent; and, after argument, an order was made by Vice-Chancellor Proudfoot, on the 26th March, 1879, setting aside the award with costs. See 26 Grant 375. The respondent appealed from that order to the Court of Appeal for Ontario, which court reversed the order of the Court of Chancery, and dismissed with costs the motion to set aside the award, on the ground that it was made too late. See 5 Ont. App. R. 1.

On appeal to the Supreme Court of Canada, **Held**, that the motion was not made within the time allowed by the statute, 9 & 10 Wm. III. c. 15, and as no good reason was given for the delay the judgment of the Court of Appeal should be affirmed. Appeal dismissed with costs.

Bickford v. Lloyd.—21st June, 1880.

7. Arbitration by order of court at Nisi Prius—To be entered as a verdict—Motion to set aside—Judge's order—Special paper Sup. Court, (N.B.)—Affidavits in reply—New matter—Discretion of court below—Con. Stats. (N.B.) c. 37, s. 173.

The cause was referred by the Supreme Court of New Brunswick at Nisi Prius to arbitration, the award to be entered on the *postea* as a verdict of a jury. After the award the appellants obtained a judge's order for a stay

Arbitration and Award—*Continued.*

of proceedings, and for the cause to be entered on the motion paper of the court below, to enable the appellants to move to set aside the award and obtain a new trial, on the ground that the arbitrators had improperly taken evidence after the case before them was closed. Before the term in which the motion was to be heard, appellants abandoned that portion of the order directing the cause to be placed on the motion paper, and gave the usual notice of motion to set aside the award and *postea*, and for a new trial, which motion, by the practice of the court, would be entered on the special paper. Defendant, in opposing such motion, took the preliminary objection that the judge's order should be rescinded before plaintiffs could proceed on their notice, and presented affidavits on the merits, and plaintiffs requested leave to read affidavits in reply, claiming that defendant's affidavits disclosed new matter. This the court refused, and dismissed the motion, the majority of the judges holding that plaintiffs were bound by the order of the judge, and could not proceed on the special paper until that order was rescinded, the remainder of the court refusing the application on the merits. 23 N. B. R. 447.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that the cause was rightly on the special paper, and should have been heard on the merits, and the court should have exercised its discretion as to the reception or rejection of affidavits in reply; Strong, J. dissenting, on the ground that such an appeal should not be heard, and also because on the merits the appeal should fail.

Per Ritchie, C.J.—A Court of Appeal ought not to differ from a court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. Con. Stats. N.B. c. 37, s. 173, applies as well to motions for new trials, where the grounds upon which the motion is based are supported by affidavits, as in other cases. It makes no distinction, but applies to all "motions founded on affidavits."

Jones v. Tuck.—xi. 197.

8. *Railway Company—Arbitration under 44 V. c. 43 (Q.)— Notary Public not disqualified as arbitrator.*

This case arises from an award made by a majority of arbitrators on the 1st of September, 1883, establishing at the amount of \$4,474 the indemnity to be paid to the respondents for a piece of land belonging to them and of which they were dispossessed by appellants in virtue of the statute of Quebec, 45 V. c. 23. Action was taken for the above sum and costs of arbitration and law costs, amounting altogether to \$4,653.20. Judgment was rendered by the Superior Court against the appellants for said amount, with interest and costs, which judgment was unanimously confirmed by the Court of Queen's Bench. The principal ground for defence was that Mr. Charlebois, being the agent of the respondents, was disqualified from acting as their arbitrator.

On appeal to the Supreme Court of Canada, **Held**, that the evidence showing that Mr. Charlebois was not in the continuous employ of respondents, but acted for them from time to time only, in his professional capacity

Arbitration and Award—Continued.

as a notary public, and not in any other capacity, he was not disqualified from acting as arbitrator. Appeal dismissed with costs.

The North Shore R. Co. v. The Rev. Ursuline Ladies of Quebec.—5th Mar. '85.

9. *Official arbitrators—Appeal from—Intercolonial Ry. Extension — Damages — Submission — Petition of Right — Demurrer—42 V. c. 8.*

The plaintiffs proceeded against the Government by petition of right for damages caused by the I. C. Ry. extension destroying their road and compelling them to sell their plant, etc. at a loss. The Crown demurred to the petition, and, the demurrer being argued before Sir W. B. Richards, C.J., judgment was given allowing the demurrer on the ground that the only remedy for the company was by reference to the official arbitrators. See 2 Excheq. C. R. Can., p. 438.

It was then agreed that the reference to the official arbitrators should be had, and the following special terms were agreed to: "Whereas, The Halifax Street Railway Company have made a claim upon the Government of Canada for compensation for damages alleged to have been sustained by that company by reason of the construction of the Intercolonial Railway, and as the government and the company have failed to agree as to such compensation, the company has requested that such claim should be referred to the official arbitrators under the statutes in that behalf; and whereas the government is willing to refer the claim to such arbitrators on the following conditions, to which the company has agreed, namely: 1. That the company shall, before the matter is entered upon before the arbitrators furnish to the government a statement of the various claims which they make in the premises, classifying separately each kind of claim. 2. That the government admit their liability to make compensation to the extent only to which they are by law bound to make such compensation. 3. That the arbitrators shall deal with each separate kind of claim separately, reporting their findings with respect to the facts connected therewith, and as to the amount of compensation (if any) which should be made therefor to the company. 4. That either party shall be at liberty to make this submission a rule of the Exchequer Court pursuant to c. 8 of the Act 42nd V. (1879), Canada, and to proceed under the provisions of the said Act before that court with respect to the award, or any part thereof, as may be thought best. 5. That any judgment, order, rule or decision of the Exchequer Court in the premises may be appealed from to the Supreme Court pursuant to the 9th section of the Act last mentioned. Therefore the Government of Canada and the said company hereby refer the said claims to the full board of arbitrators upon the terms and conditions above mentioned. And whereas, The Halifax City Railroad Company, in pursuance of the terms of the above cited order in council, has lodged with the Government of Canada a claim, of which the following is a copy, viz.: In compliance with section 1 of the reference in this matter the Halifax City Railroad Company hereby furnish the following statement of their respective claims for compensation:—1. The total loss of the railroad as a chartered property possessing exclusive privileges within the city, with all

Arbitration and Award—Continued.

its plant and real and personal properties, the estimated value of which was at the date of the government taking possession of the track the sum of \$260,000. 2. The company claims also damage for the dividing of their road into two portions rendering each valueless, and thus, in other words, destroying the whole value \$260,000. 3. The company claims also for damages actually done to the crossing for loss in having to sacrifice horses, plant and properties which were sacrificed in consequence of the act of the government, and for general depreciation in value of their real property, and for loss of their charter and the privileges and rights guaranteed under it by the Provincial Legislature, \$260,000. 4. The company claims interest at six per cent. per annum on the amount to be allowed for damages from the time of breaking up the track, say 17th May, 1876, up to the time of payment in full to the company. Therefore the Government of Canada, and the said company hereby refer the said claims to the full board of arbitrators upon the terms and conditions above mentioned."

The matter was heard on the above submission before the official arbitrators, and on the 27th August, 1880, the following award was made. After reciting the submission and the facts:—1. We find, with regard to the first item of the claim, that the company are not entitled to recover for the loss of their railroad and its plant and real and personal properties, because that railroad was neither totally nor partially lost by any actual interference of the government with the company's property. 2. We find, with regard to the second item of the claim, that the company are not entitled to be paid any compensation, because the government have not "divided their (the company's) railroad into two portions, rendering each valueless," or destroyed the value of the railroad. 3. We find, with regard to the third item of the claim, that the company is not entitled to any compensation, because the government did no actual damage to the crossing, and because the company were not obliged to sacrifice horses, plant, or properties, in consequence of any act of the government, and did not suffer any depreciation in the value of their real estate within the meaning of the Public Works Act, 31 V. c. 12, and did not lose their charter and the privileges and rights guaranteed under it by any act of the government. 4. We find, with regard to the fourth item of the claim, that nothing is due to the company for interest.

The plaintiffs appealed from this award, and Mr. Justice Henry, in the Exchequer Court, gave judgment in their favor for \$8,000. See 2 Excheq. C. R. Can., p. 449. From this judgment both parties appealed.

Held, Henry, J., dissenting, that the appeal of the Halifax Street Railway Company should be dismissed with costs, and the appeal of the Crown allowed with costs.

Halifax City Railway Company v. The Queen.—12th May, 1885.

10. Misconduct of arbitrators—Bill to rectify award—Prayer for general relief—Jurisdiction of Court—Practice—Factum.

The bill in this case was filed to rectify an award made under a submission to arbitration between the parties, because the arbitrators had considered matters not included in the submission, and had divided the sums received by

Arbitration and Award—Continued.

the defendant from the plaintiffs, on the ground that defendant's brother and partner was a party to such receipt, although the partnership affairs of the defendant and his brother were excluded from the submission. The bill prayed that the award might be amended, and the defendant decreed to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties. There was also a prayer for general relief.

Held, affirming the judgment of the Supreme Court of New Brunswick, that to grant the decree prayed for would be to make a new award, which the court had no jurisdiction to do, but, **Held**, also, reversing the decision of the court below, that under the prayer for general relief the plaintiff was entitled to have the award set aside. 28 N. B. R. 892.

The plaintiff's factum containing reflections on the conduct of the judges of the court below, was ordered to be taken off the files as scandalous and impertinent.

Vernon v. Oliver.—13th May, 1885.—xi. 156.

11. Lands taken for railway purposes—Matters considered by arbitrators—Question as to which party entitled to costs.

See COSTS, 3.

12. Municipal Act—Construction of drain—Petition for—Benefit to land in adjoining municipality—Arbitration on engineer's report—Duty of arbitrators.

See MUNICIPAL CORPORATION, 4.

13. *Award of official arbitrators—Inclusive of past and future damages—Appeal—42 V. c. 8.*

On a reference being made to the official arbitrators of certain claims made by one H. against the government for damages arising out of the enlargement of the Lachine Canal to land situated on said canal, the arbitrators awarded H. \$9,216 in full and final settlement of all claims. On an appeal taken to the Exchequer Court by H. (Taschereau, J., presiding) this amount was increased to \$15,990, including \$5,600 for damages caused to the land from 1877 to 1884 by leakage from the canal since its enlargement, and the judge reserved the right to H. to claim for future damages from that date. On appeal to the Supreme Court of Canada it was :

Held, reversing the judgment of the Exchequer Court and confirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present and future damages, and that the evidence did not justify any increase of the amount awarded.

Gwynne, J., was of opinion that under 42 V. c. 8, s. 88 the Supreme Court had power (although the crown did not appeal to the Exchequer Court) to review the award of the arbitrators, and that in this case \$1,000 would be an

Arbitration and Award—Continued.

ample compensation for any injury that the claimant's land can be said to have sustained, which upon the evidence can be attributed to the work of the enlargement of the canal.

The Queen v. Hubert.—March 1, 1887.—xiv. 737.

14. Agreement to purchase railway—Hire of rolling stock—Reference to arbitration—R. S. O. c. 50, s. 189.

See RAILWAYS AND RAILWAY COMPANIES, 39.

15. Award—Validity of—Description of land—*Faits et articles*—43-44 V. c. 43, s. 9, (P.Q.)—Art. 225, C. C. P.

E. B. *et al.*, joint owners of land situate in the city of Quebec were awarded \$11,900 under 43-44 V. c. 43, s. 9, for a portion of said land appropriated for the North Shore Railway Company. On the 12th March, 1885, E. B. *et al.* instituted an action against the North Shore Railway Company, based on the award. The company not having pleaded foreclosure was granted, and on the 21st April process for interrogatories upon *faits et articles* was issued, and returned on the 20th April. The company made default. On the 18th June the *faits et articles* were declared taken *pro confessis*. On the 16th May, E. B. *et al.* consented that the defendants be allowed to plead, but it was only on the 7th July that a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence. On the 2nd September, E. B. *et al.* inscribed the case for hearing on the merits, on which day the railway company moved to be authorized to answer the *faits et articles* and the motion was refused. The notice of expropriation and the award both described the land expropriated as No. 1, on the plan of the railway company deposited according to law, but in another part of the notice it described it as forming part of a cadastral lot 2345, and in the award as forming part of lots 2344-2345. On the 5th December judgment was rendered in favor of E. B. *et al.* for the amount of the award. From this judgment the railway company appealed to the Court of Queen's Bench (appeal side) and that court reversed the judgment of the Superior Court, holding *inter alia* the award bad for uncertainty, and that the case should be sent back to the Superior Court to allow the defendants to answer the *faits et articles*. On appeal to the Supreme Court of Canada, it was—

Held, (1) reversing the judgment of the Court of Queen's Bench (appeal side) that there was no uncertainty in the award as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by arbitrators. (2) That the motion for leave to answer *faits et articles* had been properly refused by the Superior Court. Taschereau, J., dissenting.

Beaudet et al. v. The North Shore Railway Company.—xv. 44.

[The Privy Council refused leave to appeal in this case.]

16. Street Railway—By-law and agreement providing for assuming ownership upon giving notice and fixing value by arbitration—Appointment of arbitrators by court.

See CORPORATIONS, 39.

Arbitration and Award—Continued.

17. *Expropriation—Award of official arbitrators—Compensation for land taken—Duty of Appellate Court.*

On an appeal to the Supreme Court from a judgment of the Exchequer Court increasing the amount awarded by the official arbitrators to the claimant for expropriation of land for the Intercolonial Railway.

Held, reversing the judgment of the Exchequer Court and restoring the award of the official arbitrators, that to warrant an interference with an award of value necessarily largely speculative an Appellate Court must be satisfied beyond all reasonable doubt that some wrong principle has been acted on or something overlooked which ought to have been considered by the official arbitrators, and upon the evidence in this case this court refused to interfere with the amount of compensation awarded by the official arbitrators.

Present—Sir W. J. Ritchie, C.J. and Strong, Fournier and Gwynne, JJ.

The Queen v. Paradis.— } Jan. 15, 1889.—xvi. 716.
The Queen v. Beaulieu.— }

The decision of the Exchequer Court and the judgments of the Supreme Court in these cases will be found in Vol. I., Excheq. C. R. Can., 191.

18. *Award of arbitrators increased by the Exchequer Court—Hearing of additional witness—Appreciation of the evidence—Appeal to Supreme Court—Weight of evidence.*

In a matter of expropriation of land for the Intercolonial railway, the award of the arbitrators was increased by the judge of the Exchequer Court from \$4,155 to \$10,824.25, after additional witnesses had been examined by the judge. On an appeal to the Supreme Court it was

Held, affirming the judgment of the Exchequer Court, that as the judgment appealed from was supported by evidence, and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. Gwynne, J., dissenting.

Present—Strong, Fournier, Gwynne and Patterson, JJ.

The Queen v. Charland.—April 20th, 1889.—xvi. 721.

The decision of the Exchequer Court and the judgments of the Supreme Court in this case will be found in Vol. I., Excheq. C. R. Can., 291.

19. *Contract with Crown for building of a bridge—Certificate of engineer a condition precedent to payment—Matter improperly sent to arbitration—31 V. c. 12—Costs.*

See CONTRACT, 35.

20. *Expropriation for railway purposes—Award, validity of—Riparian rights—Obstruction to accès et sortie—Right of action.*

See EXPROPRIATION, 10.

Arbitration and Award—Continued.

21. *Award made final by submission—Motion to set aside—Grounds of objection.*

An award will not be set aside on the ground that a memo., furnished by the arbitrator to the losing party after its publication, showed that the accounts between the parties were adjusted upon a wrong principle, the defect, if any, not being a mistake on the face of the award or in some paper forming part of, and incorporated with, the award, and there being no admission by the arbitrator himself that he had made a mistake.

McRae v. Lemay.—xviii. 280.

22. *Application to set aside an award—Time for applying—9 & 10 Wm. III. c. 15, s. 2—R. S. O. (1887), c. 53, s. 37—Reference back to arbitrators for re-consideration and re-determination.*

In the Province of Ontario, the governing statute as to the time for applying to set aside an award which has been made under a rule of court or to remit it to the arbitrators for re-consideration and re-determination, is R. S. O. (1887), c. 53, s. 37, and it is not required that the application should be made before the last day of the term next after the making of the award, as provided by 9 & 10 Wm. III. c. 15, s. 2. Gwynne, J., dissenting.

An award may be remitted to arbitrators for re-consideration and re-determination under the Ontario statute though the result of the re-consideration may be to have the award virtually set aside by a different, or even contrary, decision of the arbitrators.

The court is justified in remitting an award to the arbitrators if fraud or fraudulent concealment on the part of the persons in whose favour it is made is established, or if new evidence is discovered which, by the exercise of reasonable diligence, could not have been discovered before the award was made.

Green v. Citizens Ins. Co.—xviii. 338.

23. *Contract — Public work — Sub-contractor — Rescission — Quantum meruit—Setting aside award.*

P. was a contractor with the government of Canada for building a post office and K. was sub-contractor to do the mason and brick work for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and an acceptance by K. P., being dissatisfied with the work done by K., took the contract out of his hands before it was completed and finished it himself. K. then brought an action for the value of work done by him and on reference by the court to arbitration an award was made in K.'s favour. The Court of Appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that though the contract did not authorize P. to take over the work and finish it at K.'s expense, and the latter was, therefore, entitled to recover on the *quantum meruit*, yet the cost of completing the work was considerably in excess of the contract price.

Held, reversing the judgment of the Court of Appeal, that as it appeared from the evidence that the arbitrator fully understood the matter and got all

Arbitration and Award—*Continued.*

the information that could be obtained on the subject, and as no impropriety or mistake was shewn to have been committed by him, no benefit could result from sending the award back for reconsideration, and the decree of the Court of Appeal was not justified.

PRESENT.—Sir W. J. Ritchie, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Kennedy v. Pigott. —June 14, 1880, xviii. 699.

24. *Petition of right—Submission—Mediators—Award—Finality of—Art 1346, C. P. C.*

T. McG. who claimed a large sum of money from the Government of the Province of Quebec under a contract he had for the construction of a portion of the North Shore Railway, agreed to submit to three mediators or *amiables compositeurs* all controversies and difficulties existing between the Government and himself, and the submission stated that these mediators should inquire into, *inter alia*, the extent of the obligation of the contract passed between the government of Quebec and the said T. McG.; the alterations and modifications made in the plans, particulars and specifications mentioned in the said contract; what influence the said alterations and modifications may have had on the obligations of the said T. McG. and on those of the government; the delays caused by reasons irrelevant to the action of the contractor; the pecuniary value, whether for more or for less, of the alterations or any increase in the works; and finally, all things connected with the matter and the execution of the said contract, and with regard to the charges and obligations of both the government and the said contractor, according to the terms of the said contract.

The submission also provided that the award was to be executed as a final and conclusive judgment of the highest court of justice. The mediators by their award, after reciting the matters in controversy between the parties, found that the government of the Province of Quebec was indebted to T. McG. in the sum of \$147,473, and annexed thereto an affidavit stating they had inquired into all matters and difficulties submitted to them as appeared in the deed of submission. This amount being much less than the amount claimed by T. McG. he filed a petition of right, asking that the award be set aside on the ground that it did not cover the matters referred to the arbitrators in the submission. The Superior Court for the district of Quebec set aside the award, and on appeal to the court of Queen's Bench for Lower Canada (appeal side) that court reversed the judgment of the Superior Court and dismissed the petition of right. On appeal to the Supreme Court of Canada—

Held, affirming the judgment of the court of Queen's Bench for Lower Canada (appeal side) that the object of the submission was to ascertain what amount the contractor T. McG. was to receive from the government, and the specification of the several matters referred to in the submission was merely to secure that in determining the amount the mediators should fully consider all these matters, and that all matters having been so considered the award was valid. Strong and Taschereau, JJ., dissenting.

Arbitration and Award—Continued.

Per Fournier, J., Mediators (amiables compositeurs) are not subject to the provisions of Art. 1346, C. P. C. and their award can only be set aside by reason of fraud or collusion if given on the matters referred to them.

McGreavy v. The Queen.—xix. 180.

25. *Expropriation—R. S. Q. Art. 5164, ss. 12, 16, 17, 18, 24—Award—Arbitrators—Jurisdiction of—Lands injuriously affected—43 & 44 V. c. 43 (P.Q.)—Appeal—Amount in controversy—Costs.*

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of \$1,974.25 damages and costs for land expropriated was made under Art. 5164, R. S. Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award—

Held, affirming the judgment of the courts below, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau, JJ., doubted if the amount in controversy was sufficient to give the court jurisdiction to hear the appeal, the amount of the award being under \$2,000, and to make up the appealable amount, either interest accrued after the date of the award and after action brought or the costs taxed on the arbitration proceedings would have to be added.

The Quebec, Montmorency and Charlevoix Railway Co. v. Mathieu.—xix. 426.

And see JURISDICTION, 88.

26. *Expropriation under Railway Act—R. S. C. c. 109, s. 8, ss. 20-21—Discretion of arbitrators—Award—Inadequate compensation.*

In a case of an award in expropriation proceedings under the Railway Act, R. S. C. c. 109, it was held by the Superior Court for L. C. and the Court of Queen's Bench for L. C. (appeal side) that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice. On appeal to the Supreme Court of Canada: **Held**, that the judgment should not be interfered with.

Benning v. The Atlantic & N. W. Ry. Co.—xx. 177.

27. *Municipal Corporation—Drainage of lands—Injury to other lands by—Remedy for—Arbitration—Notice of action—Mandamus.*

See MUNICIPAL CORPORATION, 26.

Arbitration and Award—Continued.**28. Setting aside award—Expropriation for the I. C. Ry.**

See EXPROPRIATION, 19.

Arrest, False—Notice of action against Magistrate.

See NOTICE, 8.

2. Wrongful—Action for—Justification—Canada Temperance Act, 1878.

See CANADA TEMPERANCE ACT 1878, 6.

3. Of commercial traveller for selling without license—By-law of city of Quebec—29 & 30 V. c. 57, ss. 20, 21 (Q.).

See LICENSE, 6.

MALICIOUS ARREST.

MALICIOUS PROSECUTION.

Assault—On constable when serving summons charging violation of Canada Temperance Act—Wife not a competent witness on her husband's behalf—R. S. C. c. 162, s. 34—R. S. C. c. 174, 216.

See CRIMINAL APPEAL, 11.

Assessment and Taxes.—Assessment—Notice of—Alteration without notice by Court of Review—Liability.

The plaintiffs, being persons liable to assessment, were served by the assessors of a municipality with a notice in the form prescribed by 32 V. c. 86, s. 48 (O.), and on that notice the amount of their personal property, other than income was put down at \$2,500, but on the column of the assessment roll, as finally revised by the court of revision, the amount was put down at \$25,000, thereby changing, without giving any further notice to plaintiffs, the total value of real and personal property and taxable income from \$20,900 to \$43,400.

Held, that the plaintiffs were not liable for the rate calculated on this last named sum, and that a notice, to be given by the assessor in accordance with the Act, is essential to the validity of the tax. [Since this decision the statute has been altered.]

Nicholls v. Cumming.—i. 395.

2. Assessment roll—Amendment of—Triennial assessment roll—Arts. 716 and 746 (a) M. C. (P.Q.).

See PROHIBITION.

3. Assessment—Improper—False imprisonment—Arrest—41 V. c. 9 (N.B.)—Execution issued by receiver of taxes for city of St. John—"Respondeat superior."

The 41 V. c. 9, intituled "An Act to widen and extend certain public streets in the city of St. John," authorized commissioners appointed by the Governor

Assessment and Taxes—*Continued.*

in Council to assess the owners of the land who would be benefited by the widening of the streets, and in their report on the extension of Canterbury street, the commissioners so appointed assessed the benefit to a certain lot at \$419.46, and put in their report the name of the appellant (McS.) as the owner. The amount so assessed was to be paid to the corporation of the city, and, if not, it was the duty of the receiver of taxes, appointed by the city corporation, to issue execution and levy the same. McS., although assessed, was not the owner of the lot. S., the receiver of taxes, in default, issued an execution, and for want of goods McS. was arrested and imprisoned until he paid the amount at the chamberlain's office in the city of St. John. The action was for arrest and false imprisonment, and for money had and received. The jury found a verdict for McS. on the first count against both defendants.

Held, reversing the judgment of the Supreme Court of New Brunswick, that S., who issued the warrant founded upon a void assessment and caused the arrest to be made, was guilty of a trespass, and being at the time a servant of the corporation, under their control and specially appointed by them to collect and levy the amount so assessed, the maxim of *respondet superior* applied, and therefore the verdict in favor of McS. for \$635.39 against both respondents on the first count should stand. Ritchie, C.J., and Taschereau, J., dissenting.)

Per Gwynne, J.—That the corporation had adopted the act of their officer as their own by receiving and retaining the money paid and authorizing McS.'s discharge from custody only after such payment.

McSorley v. The Mayor, etc., of the City of St. John.—vi. 531.

4. 35 V. (P.Q.) c. 51, s. 192—*Assessment for footpaths—Validity of—Proof of error—Onus probandi—Voluntary payment—Notice, want of.*

On the 31st May, 1875, under the authority of 37 V. c. 51, s. 192, (P.Q.), the city council of the city of Montreal by a resolution adopted a report from their road committee prepared on the 30th April previous, as amended by a report of their finance committee of May 27, 1875, recommending the construction of permanent sidewalks in the following streets (*inter alia*), Dorchester and St. Catharine. On the adoption of these reports, with which an estimate indicating the quality of flag stone required for each street, and the approximate cost of the work to be made in each street, had been submitted, the city surveyor caused the sidewalks in said streets to be made, and assessed the cost of the sidewalks according to the front of the real estate owned by the proprietors on each side of the same, and prepared a statement of the same, which he deposited with the treasurer for collection. D. A. B. possessed real estate on Dorchester and St. Catharine streets, and did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving a notice from the city treasurer to pay within fifteen days certain sums, in default whereof execution would issue, D. A. B. paid, without protest, \$946.25; and on the 29th October, 1878, paid a further sum of \$438.90, and on the 14th November, 1878, without having received any notice, paid \$700 on account of 1877 assessment.

Assessment and Taxes—Continued.

In an action instituted by D. A. B. against the city of Montreal, to recover the said sums of money which she alleged to have paid in error, believing the said assessment valid, **Held**, affirming the judgment of the court below, Henry and Gwynne, JJ., dissenting, that D. A. B. had failed, both in allegation and proof, to make out a case for the recovery of the assessment paid by her, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might, in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of void assessment illegally extorted. 2. That the city council, in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 V. c. 51, s. 192. 3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal.

Bain v. City of Montreal.—viii. 252.

5. Assessment of ship—Owned by resident of Halifax, but not registered there—Not liable to city assessment.

See SHIPS AND SHIPPING, 3.

6. *Foreign corporation—Branch bank—"Income," as distinguished from "net profits"*—31 V. c. 3, s. 4, (N.B.).

L., manager of the bank of B. N. A., a foreign banking corporation, having a branch in the city of St. John, derived from such business during the fiscal year of 1875 an income of \$46,000, but, during the same period, sustained losses in its business beyond that amount. The bank, having made no gain from said business, disputed the corporation's authority to assess them under 22 V. c. 37; 31 V. c. 36; and 34 V. c. 18, on an income of \$46,000.

Held, that under the Acts of the Assembly relating to the assessing of rates and taxes in the city of St. John, foreign banking corporations doing business in St. John are liable to be taxed on the gross income received by them during the fiscal year: and that L. had been properly assessed. Henry, J., dissenting.

[On appeal to the Privy Council the judgment of the Supreme Court of Canada was reversed. See 6 App. cases 373.]

Lawless v. Sullivan.—iii. 117.

7. *Taxes—Sale of land for*—32 V. c. 76, s. 155, (O.)—*Proof of taxes in arrear.*

In a suit commenced by a bill in the Court of Chancery asking for an account of damages sustained by certain trespasses alleged to have been committed by the appellant (defendant), for an injunction and for possession, the principal question raised was whether a sale of the land for taxes, which

Assessment and Taxes—*Continued.*

took place on the 1st March, 1856, through and under which the respondent (plaintiff) claimed title was valid.

Held, that there was no evidence to show the land sold had been properly assessed, and therefore the sale of the land in question was invalid. Strong and Gwynne, JJ., dissenting.

Per Fournier, Henry and Gwynne, JJ.—Where it appears that no portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid, and the defect is not cured by s. 155 of 32 V. c. 36 (O.). Strong, J., dissenting, holding that section 155 applied to a case where any taxes were in arrear at the date of the sale.

McKay v. Cryslar.—iii. 436.

8. *Taxes—Sale of lands for—Indian lands—Liability to taxation—Lists of lands attached to warrant—32 V. c. 36. s. 128, (O.), and c. 108, s. 156, R. S. O.*

In September, 1857, a lot in the township of Keppel, in the county of Grey, forming part of a tract of land surrendered to the Crown by the Indians, was sold, and in 1869, the Dominion Government, who retained the management of the Indian lands, issued a patent therefor to the plaintiff. In 1870, the lot in question, less two acres, was sold for taxes assessed and accrued due for the years 1864 to 1869, to one D. K., who sold to defendant; and as to the said two acres, the defendant became purchaser thereof at a sale for taxes in 1873. The warrants for the sale of the lands were signed by the warden, had the seal of the county, and authorized the treasurer "to levy upon the various parcels of land hereinafter mentioned for the arrears of taxes due thereon and set opposite to each parcel of land," and attached to these warrants were the lists of lands to be sold, including the lands claimed by plaintiff. The lists and the warrant were attached together by being pasted the whole length of the top, but the lists were not authenticated by the signature of the warden and the seal of the county. By section 128 of the Assessment Act, 32 V. c. 36 (O.), the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him, &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, etc.

Held, affirming the judgment of the court below, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands, and upon being granted became liable to assessment. 2. That the list and warrant may be regarded as one entire instrument, and as the substantial requirements of the statute had been complied with, any irregularities had been cured by the 156th section, c. 180, R. S. O. (Fournier and Henry, JJ., dissenting.)

Church v. Fenton.—v. 239.

9. *Inhabitant of the city of St. John—Taxation—Wife's separate property.*

Plaintiff was a resident of the city of St. John up to June, 1877, when he went with his family to Nova Scotia. In 1878, he returned to the Province

Assessment and Taxes—Continued.

of New Brunswick with his wife and family, and after leaving them in the town of Portland, went to Boston in search of employment. He remained in Boston until the spring of 1880, having been employed in business, and paid taxes there. Whilst plaintiff was absent, his wife's father assigned to her a lot of leasehold property in the city of St. John. In the fall of 1878 she and family moved into the city and resided on her property until the spring of 1880, when the plaintiff returned from Boston and lived with his wife. For the taxes for 1879, assessed against him in respect of his wife's property, and for an income tax against himself, both being included in one assessment, he was afterwards arrested and taken to jail, where he remained two days, when he paid the amount under protest, and was released. He brought an action for false imprisonment, and obtained a verdict for \$150.

The full court of N. B. set aside the verdict, and granted a new trial, a majority being of opinion that the plaintiff was constructively an inhabitant of the city of St. John, and as such was liable to be assessed, and that there ought to be a new trial, as it did not very distinctly appear that objections were taken at the trial, or upon what the motion for a non-suit was to depend.

On appeal, the Supreme Court of Canada **Held**, that the plaintiff was not liable to assessment, and that the verdict should stand. Appeal allowed, with costs.

Edwards v. The Mayor, etc., of St. John—1st May, 1883.

10. Sale for taxes—33 V. c. 23 (O.)—Possession obtained by fraud.

See POSSESSION, 5.

11. *St. John City Assessment Act, 1882, 45 V. c. 59, (N.B.)—Chartered bank—Assessment on capital stock of—Par value—Real and personal property of bank—Payment of taxes under protest.*

By section 25 of the St. John City Assessment Act of 1882, it is provided that all rates and taxes levied and imposed upon the city of St. John shall be raised by an equal rate upon the value of the real estate situate in the city, and part of the city to be taxed, and upon the personal estate of the inhabitants, and of persons deemed and declared to be inhabitants and residents of the said city, and upon the capital stock, income, or other thing, of joint stock companies, corporations, or persons associated in business, and after providing for the levying of a poll tax such section goes on to say, "that the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income, and joint stock, according to the true and real value and amount of the same as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof." Section 28 of the same Act provides that, "all joint stock companies and corporations shall be assessed, under this Act, in like manner as individuals; and for the purposes of such assessment, the president, or any agent, or manager, of such joint stock companies shall be deemed and taken to be the owner of the real and personal estate, capital stock and assets of such company or corporation, and

Assessment and Taxes—Continued.

shall be dealt with, and may be proceeded against accordingly." J. D. L., the president of the Bank of New Brunswick, was assessed, under the provisions of the above Act, on real and personal property of the bank, valued in the aggregate at \$1,100,000. The capital stock of the bank at the time of such assessment was only \$1,000,000, and he offered to pay the taxes on that amount which was refused. It was not disputed that the bank was possessed of real and personal property of the value assessed.

On appeal from the Supreme Court of New Brunswick, refusing a *certiorari* to quash the said assessment, 28 N. B. R. 591. **Held**, Fournier, J., dissenting, that the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, \$1,000,000.

The chamberlain of the city of Saint John is authorized, without any previous proceedings, to issue execution for taxes if not paid within a certain time after notice. In order to avoid such execution the Bank of New Brunswick paid their taxes under protest.

Held, that such payment did not preclude them from afterwards taking proceedings to have the assessment quashed.

Ex parte J. D. Lewin.—xi. 484.

12. *Property occupied under lease by Militia Department—Not liable to municipal taxation—Prerogative of the Crown—*10-11 V. c. 17 — 23 V. c. 61, s. 58 — C. S. L. C. c. 4, s. 2 — 37 V. c. 51, s. 237 (Q.)—*Mun. Code L. C. Art. 712*—36 V. c. 21, s. 18, (Q.)

The Dominion Government having leased certain property in the city of Montreal for the use of Her Majesty, with the condition that the government should pay all taxes and assessments which might be levied and become due on the said premises during the term of the lease, the corporation of the city of Montreal brought an action against the owners of the property for the municipal taxes accruing during the period of time the said property was so leased to and occupied by the government of the Dominion of Canada. On an intervention filed by the Attorney-General of Canada praying that the action be dismissed: **Held**, reversing the judgment of the court below, Strong, J., dissenting, that the property in question was exempt from taxation under C. S. L. C. c. 4, s. 2. *Corporation of Quebec v. Leaycraft*, 7 Q. L. R. 56, distinguished.

Attorney-General of Canada v. City of Montreal.—xiii. 352.

13. *Educational institution—Cons. Stat. L. C. c. 15, and 41 V. c. 6, s. 26, (P.Q.)—Art. 712 Mun. Code, (P.Q.)—Construction of.*

Action by the city of Montreal to recover the sum of \$408, for assessment or taxes for the years 1878, 1879 and 1880, on property in said city occupied by the defendant. The property set out in the plaintiff's declaration was during the time mentioned therein occupied and used as a private boarding

Assessment and Taxes—Continued.

and day school for girls, kept and maintained by the defendant, who employed divers teachers, and during that time had therein, on an average, for their education, as pupils, eighty-five girls per annum. The said institution never received any grant from the plaintiff.

Held, Gwynne, J., dissenting, that the said institution is an educational establishment within the meaning of 41 V. c. 6, s. 26, (P.Q.), and exempt from municipal taxation.

Wylie v. The Corporation of the City of Montreal.—8th March, 1886—xii. 384.

14. *Educational institution—Farm owned by—Revenue from—Not property held for the purposes for which institution established—Not exempt from school taxes—32 V. c. 16, s. 13 (Q.)—C. S. L. C. c. 15, s. 77—41 V. c. 6, s. 26 (Q.).*

The action was brought to recover the sum of \$808.50 for three years' school taxes imposed on property occupied by the respondents as a farm, situated in one municipality, the products of which, with the exception of a portion sold to cover the expenses of working and cultivating, were consumed at the mother house situated in another municipality. **Held**, reversing the judgment of the court below, that as the property taxed was not occupied by the respondents for the objects for which they were instituted, but was held for the purpose of deriving a revenue therefrom, it did not come within the exemptions from taxation for school rates provided for by s. 13, of c. 16, 32 V., (P.Q.) **Held**, also, that said section 13 does not extend, as regards exemptions, section 77 of chapter 15 of the Cons. Stats. L. C., which has not been repealed, but which has been amended by the addition of s. 26, c. 6, 41 V. (P.Q.).

Les Commissaires D'Ecoles de St. Gabriel v. Les Sœurs de la Congregation de Notre Dame de Montreal.—xii. 45.

15. *Assessment on real estate—In name of occupier—Description as to persons and property—Con. Stat. (N.B.), c. 100, s. 16—Several assessments in one warrant—One illegal assessment—Warrant vitiated by.*

Section 16 of chapter 100, Con. Stats. of New Brunswick relating to rates and taxes, provides that, "real estate, where the assessors cannot obtain the names of any of the owners, shall be rated in the name of the occupier or person having ostensible control, but under such descriptions as to persons and property . . . as shall be sufficient to indicate the property assessed, and the character in which the person is assessed." T. G., owner of real estate in Westmoreland County, N.B., died, leaving a widow who administered to his estate and resided on the property. The property was assessed for several years in the name of the estate of T. G., and in 1878 it was assessed in the name of "Widow G."

Held, affirming the judgment of the court below, that the last named assessment was illegal, as not comprising such description of persons and property as would be sufficient to indicate the property assessed, and the character in which the person was assessed. Where a warrant for the

Assessment and Taxes—*Continued.*

collection of a single sum for rates of several years, included the amount of an assessment which did not appear to be against either the owner or the occupier of the property.

Held, affirming the judgment of the court below, that the inclusion of such assessment would vitiate the warrant.

Flanagan v. Elliott.—xii. 495.

16. Town of Dartmouth not liable to contribute to assessment for support of schools in County of Halifax—Ratepayers of 1886 not liable to be assessed for school rates leviable in previous years.

See MANDAMUS, 7.

17. *Railway bridge and railway track—Assessments of—Illegal—40 V. c. 29, ss. 326 and 327—Injunction—Proper remedy—Extension of town limits to middle of a navigable river—Intra vires of local legislature—43-44 V. c. 62, (P.Q.)*

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, (Fournier and Taschereau, JJ., dissenting) that the portion of the railway bridge built over the Richelieu river, and the railway track belonging to appellant's company within the limits of the town of St. Johns, are exempt from taxation under sections 326 and 327 of 40 V. c. 29 (P.Q.), although no return had been made to the council by the company of the actual value of their real estate in the municipality. 2. That a warrant to levy the rates upon such property for the years 1880-83, is illegal and void, and that a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same.

As to whether the clause in the Act of incorporation of the town of St. Johns, (P.Q.), extending the limits of said town to the middle of the Richelieu, a navigable river, is *intra vires* of the legislature of the Province of Quebec, the Supreme Court of Canada affirmed the holding of the court below that it was *intra vires*.

Central Vermont Ry. Co. v. The Town of St. Johns.—xiv. 288.

[In this case leave to appeal was granted by the Judicial Committee. After argument the judgment of the Supreme Court was affirmed. See 14 App. Cases, 590.]

18. *Municipal taxes—Special assessments—Exemption—41 V. c. 6, s. 26 (Q.)—Educational institution—Tax.*

By 41 V. c. 6, s. 26, all educational houses or establishments which do not receive any subvention from the corporation or municipality in which they are situated are exempt from municipal and school assessments "whatever may be the Act in virtue of which such assessments are imposed, and notwithstanding all dispositions to the contrary."

Assessment and Taxes—*Continued.*

Held, reversing the judgment of the court below, that the exemption from municipal taxes enjoyed by educational establishments under said 41 V. c. 6, s. 26, extends to taxes imposed for special purposes, *e.g.*, the construction of a drain in front of their property. (Sir. W. J. Ritchie, C.J., dissenting.)

Per Strong, J.—Every contribution to a public purpose imposed by superior authority is a "tax."

Les Ecclesiastiques de St. Sulpice de Montreal v. The City of Montreal.
—xvi. 399.

[In this case the Judicial Committee of Privy Council refused leave to appeal. See Judgment of J. C. at p. 407 of vol. xvi. Can. S. C. Reports.]

19. *Lien—Priority of mortgage made before statute—Construction of Act—Healing clauses—Effect and application of.*

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon except as against the crown.

Held, affirming the judgment of the court below, that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed.

The Act provided that in case of non-payment of taxes assessed upon any lands thereunder the city collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the mayor should affix his signature and the seal of the corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on any real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, etc. In a suit to foreclose a mortgage on land which had been sold for taxes under this Act the legality of the assessment and sale was attacked.

Held, *per* Strong, Taschereau and Gwynne, JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section it was necessary for the defendants to show, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the Act, and the production and proof of one of such statements was not sufficient.

Per Ritchie, C.J., and Patterson, J., that it was sufficient to produce the statement returned to the collector signed and sealed as required, and with the necessary warrant annexed, and in the absence of evidence to the contrary it must be assumed that all the proceedings were regular and that the provisions of the statute requiring duplicate statements had been complied with.

The Act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.

Held, *per* Strong, Taschereau and Gwynne, JJ., that this provision could only operate to make the deed available to cure defects in the proceed-

Assessment and Taxes—Continued.

ings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be imposed.

Held, per Ritchie, C.J. and Patterson, J., that the deed could not be invoked in the present case to cure any defects in the proceedings, as it was not delivered to the purchaser until after the suit commenced; therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the Act, rendered the sale void.

O'Brien v. Cogswell.—xvii. 420.

20. Assessment—Mandamus to compel municipality to make—Employment of physician by board of health—Dismissal—Form of remedy.

See MUNICIPAL CORPORATION, 14.

21. Municipal Act, Manitoba, 49 V. c. 52, s. 626—50 V. c. 10 s. 43 (Man.)—Penalty for non-payment of taxes—Interest—Legislative jurisdiction—B. N. A. Act, ss. 91 and 92.

See LEGISLATURE, 20.

MUNICIPAL CORPORATION, 16.

22. Taxation on crown lands—Beneficial interest—Prerogative—Mortgage.

See PARLIAMENT OF CANADA, 12.

CROWN, 23.

23. Lands of the C. P. Ry. Co—Exemptions from taxation until sold or occupied.

By the charter of the C. P. Ry. Co., the lands of the company in the North-west Territories, until they are either sold or occupied, are exempt from Dominion, provincial or municipal taxation for twenty years after the grant thereof from the crown.

Held, affirming the judgment of the court below, that lands which the company have agreed to sell and as to which the conditions of sale have not been fulfilled are not lands "sold" under this charter.

Held, further, that the exemption attaches to lands allotted to the company before the patent is granted by the crown. Lands which were in the N. W. T. when allotted to the company did not lose their exemption on becoming, afterwards, a part of the province of Manitoba.

Rural Municipality of Cornwallis v. The Canadian Pacific Railway Co.

—xix. 702.

24. Tax Sale—Irregularities—Validating acts—Crown lands—45 V. c. 16 s. 7 (Man.)—51 V. c. 27 s. 58 (Man.).

Lands in Manitoba assessed for the years 1880-81, were sold in 1882 for unpaid taxes. The statute authorizing the assessment required the municipal

Assessment and Taxes—*Continued.*

council, after the final revision of the assessment roll in each year, to pass a by-law for levying a rate on all real and personal property mentioned in said roll, but no such by-law was passed in either of the years 1880 or 1881. The lands so assessed and sold were formerly Dominion lands which were sold and paid for in 1879, but the patent did not issue until April, 1881. The patentee sold the lands, and after the tax sale a mortgage thereon was given to R. who sought to have the tax sale set aside as invalid. 45 V. c. 16, s. 7 (Man.) provides that every deed made pursuant to a sale for taxes shall be valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from its execution, and 51 V. c. 27, s. 58 (Man.) provides that "all assessments heretofore made and rates struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby."

Held, affirming the judgment of the court below, Patterson, J., dissenting, that the assessments for the years 1880-81 were illegal for want of a by-law, and the sale for taxes thereunder was void. If the lands could be taxed the defect in the assessments was not cured by 45 V. c. 16, s. 7, or by 51 V. c. 27 s. 58, which would cure irregularities, but could not make good a deed that was a nullity, as was the deed here.

Held, per Gwynne, J., Patterson, J., *contra*, that the patents for the lands not having issued until April, 1881, the said taxes accrued due while the lands vested in the Crown, and so were exempt from taxation.

Held, per Strong, J., following *McKay v. Chrysler*, 3 Can. S. C. R. 436, and *O'Brien v. Cogswell*, 17 Can. S. C. R. 420, that the operation of 45 V. c. 16, s. 7, is restricted to curing the defects in the proceedings for the sale itself as distinguished from the proceedings in assessing and levying the taxes which led to the sale.

Whelan v. Ryan.—xx. 65.

25. Municipal by-law—Annual tax on company—Validity—Appeal—R. S. C. c. 135 s. 24 (g).

See JURISDICTION, 93.

26. Taxation of railway—Statutory form—Departure from—Powers of assessors—53 V. c. 27, s. 125 (N.B.)

By the assessment law of the city of St. John, 53 V. c. 27, s. 125, (N.B.), the agent or manager of any joint stock company or corporation established abroad or out of the limits of the province may be rated and assessed upon the gross and total income received for such company or corporation deducting only therefrom reasonable cost of management, etc., and such agent or manager is required to furnish to the assessors each year a statement under oath in a prescribed form showing the gross income and the deductions of the various classes allowed, the balance to be the income to be assessed; and in case of neglect to furnish such statement the assessors are to fix the amount of such income to be assessed according to their best judgment, and there shall be no appeal from such assessment.

Assessment and Taxes—*Continued.*

The Atlantic division of the C. P. R. runs from Megantic in the province of Quebec through the state of Maine into New Brunswick. On entering New Brunswick it runs over a line leased from a N. B. Co. to the western side of the river St. John, and then over a bridge into the city where it takes the I. C. R. road. The general superintendent has an office in the city, but all monies received there are sent to the head office in Montreal.

The superintendent was furnished with a printed form to be filled up for the assessors as required by said Act, which was as follows:

"Gross and total income received for company during the fiscal year of —, next preceding the first day of April. This amount has not been reduced or off set by any losses, etc." This latter clause the superintendent struck out and filled in in the first place by stating that no income had been received by the company, the remainder of the form, consisting of details of the deductions, was not filled in. This was given to the assessors as the statement called for, and they disregarded it, assessing the company on an income of \$140,000 without making any inquiries of the superintendent as the Act authorized them to do. A rule for a *certiorari* to quash this assessment was obtained, but discharged by the court on the ground that the superintendent had so far departed from the prescribed form that he had in effect failed to furnish a statement as required by the Act, and the assessment against him was final.

Held, reversing the decision of the Supreme Court of New Brunswick, Fournier and Taschereau, JJ., dissenting, that the superintendent had a right to modify the form prescribed to enable him to show the true facts as to the business of the company in St. John, and the assessors had no right to arbitrarily fix an amount assessable against him without taking any steps to inform themselves of the truth or falsity of the statement furnished.

Held, also, that the provision that there should be no appeal from the assessment where no statement is furnished, relates only to an appeal against over-valuation under C. S. N. B. c. 100, s. 60, and does not abridge the power of the court to do justice if the assessors assess arbitrarily or upon a wrong principle or no principle at all.

Held, *per* Gwynne and Patterson, JJ., that the assessment law of St. John does not apply to railway companies, there being no provision made for ascertaining the amount of business done in the city as proportioned to the whole business of the company.

Appeal allowed with costs.

Present: Strong, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Timmerman v. City of St. John.—20th Feby., 1898.

27. *Insurance Co.—Net Profits—Deposit with government—Statement to assessors—Variance from form.*

By section 126 of the St. John City Assessment Law, 1889, 52 V. c. 27, the agent or manager of any life insurance company doing business out of the province is liable to be assessed upon the net profits made by him as such agent

Assessment and Taxes—*Continued.*

or manager from premiums received on all insurances effected by him; and the better to enable the assessors to rate such company, the agent or manager is required to furnish at a certain time in each year a statement under oath, in a prescribed form, setting forth the gross income and particulars of the losses and deductions claimed therefrom, and showing the rateable net profits for the preceding year.

By the form prescribed, the deductions to be made from the gross income consist of re-insurance, rebate, etc., actually paid and amounts paid on matured claims on policies issued by such agent or manager. In the form presented by the agent of a life insurance company in St. John, N. B., there was no amount entered for deductions of the latter class, but instead thereof, an item was inserted, of "75 per cent. of premiums deposited with government for protection of policy holders," which was an addition to the form. The statement showed that the deductions exceeded the gross income, leaving no net profits to be taxed. The assessors, on receiving this statement, disregarded the result shown thereby, and assessed the agent on net profits for the year of \$6,300. A rule *nisi* for a *certiorari* to quash the assessment was obtained, in support of which it was shown by affidavit that the amount required to be deposited with the Dominion Government by the company assessed was about 75 per cent. of the premiums received, and that the amount of such deposits from time to time returned to the company was applied for the benefit of policy-holders and formed no part of the income profits or of the company. The Supreme Court of New Brunswick discharged the rule and refused to quash the assessment on the grounds that the government deposit was part of the income of the company held in reserve for certain purposes and formed no part of the expenditure, and that the agent had no right to strike out certain requirements of the form prescribed and substitute different statements of his own.

Held, reversing the decision of the court below, Fournier and Taschereau, JJ., dissenting, that the agent was justified in departing from the form to show the real state of the business of the company, and the deposit was properly classed with the deductions, and the assessors had no right to disregard the statement and arbitrarily assess the company as they did.

Appeal allowed with costs.

Present:—Strong, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Peters v. City of St. John.—20th Feby., 1893-

28. *Municipal Corporation—Water rates—Discount by prompt payment—Property exempt from municipal taxation—Discrimination as to—R. S. O. (1887), c. 184, s. 480, s-s. 3—c. 192, ss. 19, 20.*

By R. S. O. (1887), c. 184, s. 480, s-s. 3 (Municipal Institutions Act) it is the duty of a municipal corporation which has constructed water-works, to supply water to all buildings on land along the line of any supply pipe, on request of the owner or occupant thereof. By c. 192, s. 19 (Municipal Water Works Act) the

Assessment and Taxes—Continued.

corporation has authority to regulate the distribution and use of water and fix the prices and time of payment therefor, and by s. 20 the corporation may pass by-laws etc., for allowing a discount for pre-payment.

Pursuant to these powers the corporation of the City of Toronto passed a by-law allowing a discount on all water rates paid in the first month of the quarter for which they should be due but the same was not to apply to Government or other institutions, which are exempt from city taxes. A tender was made to the city of the amount assessed, on property of the Dominion Government less the discount allowed by the by-law which was refused and the whole amount having been paid under protest an action was brought against the city for the rebate.

Held, reversing the decision of the Court of Appeal (18 Ont. App. R. 622) and that of Ferguson, J., at the trial (20 O. R. 19) Patterson, J., dissenting, that the legislature intended and enacted that the rate for water supplied by the city should be an equal rate charged upon all consumers alike and the city corporation had no power to impose a greater rate for water supplied to a consumer who is not subject to civic taxation than is imposed upon consumers who are; therefore the by-law was *ultra vires* in so far as it makes a distinction between the two classes of consumers.

Per Patterson, J. The imposition of water rates is not a tax, and there is no principle on which the city can be prevented from demanding a larger price for water supplied to consumers who have paid no part of the cost of constructing works than it is willing to receive from those who have.

Present: Strong, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Attorney-General of Canada v. City of Toronto—20th February, 1898.

Assignment—Under foreign bankruptcy.

See INSOLVENCY, 2.

2. In trust.

See INSURANCE, 4.

3. *For benefit of creditors—Power to sell on credit—Fraudulent Preference—R. S. O. c. 118, s. 2.*

In a deed of assignment for the benefit of creditors, the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, etc., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown.

Held, affirming the judgment of the court below, that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act, R. S. O. c. 118, s. 2.

Slater v. Badenach.—x. 296.

Assignment—Continued.

4. Of a Government contract without prior consent of Government—Effect of.

See PETITION OF RIGHT, 14.

5. Order for delivery of bonds of railway company.

See RAILWAYS AND RAILWAY COMPANIES, 19.

6. *Right of assignee to sue under voluntary assignment—Arts. 13 and 19 C. C. P. (L. C.)—Assignee represents only assignor.*

Held, in the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not by a plea in his own name ask to have a conveyance, made by the debtor to the plaintiff, prior to the assignment under which defendant claimed, rescinded or set aside as fraudulent against creditors.

The nullity of a deed should not be pronounced without putting all the parties to it *en cause en déclaration de jugement commun*.

Semle—The plaintiff, being a second purchaser in good faith and for value, acquired a valid title to the property in question, which he could set up even against an action brought directly by the creditors.

Burland v. Moffatt.—xi. 76.

See also *Brown v. Pinsonneault* (8 Can. S. C. R. 102) (Lease 1).

[Both *Burland v. Moffatt* and *Brown v. Pinsonneault* have been overruled by the Judicial Committee of the P. C., which has *held*, in *Porteous v. Reynar*, 13 App. Cases 120, that, Art. 19 C. C. P. is applicable to mere agents or mandataries. It is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate.]

See also TRUSTS AND TRUSTEES, 15.

7. Of interest in tender for contract—Provision against assignment of interest in contract.

See CONTRACT, 24.

8. For benefit of creditors—Accidental omission of claim from schedule of debts—R. S. O. c. 118, s. 2.

See FRAUDULENT PREFERENCE, 3.

9. Condition not to assign in policy of insurance—Chattel mortgage not breach of.

See INSURANCE, FIRE, 16.

Assignment—Continued.**10. *In trust for creditors—Creditor attacking—Effect of—Right to participate in after.***

A creditor is not debarred from participating in the benefits of an assignment in trust for the general benefit of creditors, by an unsuccessful attempt to have such deed set aside as defective.

Gardner v. Klöpfer.—xv. 390.

11. *For benefit of creditors—Obtained by Duress—Improper use of criminal process—Stifling criminal charge.*

S., a trader in Yarmouth, N. S., had a number of creditors in Montreal. J., one of such creditors, preferred a criminal charge against S., sent a detective to Yarmouth with a warrant, caused such warrant to be indorsed by a local magistrate and had S. brought to Montreal, when the other creditors there issued writs of *capias* for their respective claims. The father of S. came to Montreal, and in consideration of the release of S. on both the civil and criminal charges, transferred all his property for the benefit of the Montreal creditors, and S. was released from gaol, having given his own recognizance to appear on the criminal charge. In the settlement to the claims of the creditors was added the costs of both the civil and criminal suits. In a suit to set aside the transfer as being obtained by duress and to stifle the criminal prosecution, the evidence showed that the creditors, in taking the proceedings they did, expected to obtain the security of the friends of S.

Held, affirming the judgment of the court below, 20 N. S. Rep. 378, that the nature of the proceedings and the evidence clearly showed that the criminal process was only used for the purpose of getting S. to Montreal to enable the creditors to put pressure on him, in order to get their claims paid or secured, and the transfer made by the father under such circumstances was void.

Shorey v. Jones.—xv. 398.

12. *In trust for creditors—Preference—Fraud against creditors—Statute of Elizabeth—Resulting trusts.*

A deed of assignment of property in trust for the benefit of creditors provided for the distribution of the assets by the assignee as follows: First, to pay certain named creditors in full. Secondly, if sufficient assets remained after such payment to pay certain other named creditors in full, or, if the assets should not be sufficient, to distribute the same *pro rata* among such second preferred creditors. Thirdly, to divide the remaining assets among all the creditors not preferred in equal proportions according to their respective claims, and, fourthly, to pay the balance remaining after distribution to the assignor. The deed required all creditors executing it to release the assignor from any and every claim of the executing creditor against him, and provided that the assignee should not be liable to account for more money and effects than he should actually receive, nor be responsible for any loss or damage to the trust, except such as should happen through his own wilful neglect. In an action to set aside the deed :

Assignment—Continued.

Held, affirming the judgment of the court below, Gwynne and Patterson, JJ., dissenting, that the deed was one to which it was unreasonable to expect unpreferred creditors to become parties, and therefore, and because it contained a resulting trust in favor of the debtor, it was void under the statute, 13 Eliz. c. 5.

Whitman v. The Union Bank of Halifax.—xvi. 410.

13. Assignment for benefit of creditors—Costs of execution creditor—Construction of statute—48 V. c. 26, s. 9—49 V. c. 25, s. 2.

Under 48 V. c. 26, s. 9, as amended by 49 V. c. 25, s. 2, an assignment for the general benefit of creditors has precedence of executions not completely executed by payment subject to the lien of any execution creditor for his costs, where there is but one execution in the sheriff's hands, or of the creditor who has first placed his execution in the sheriff's hands when there are more than one.

Held, Gwynne and Patterson, JJ., dissenting, that the lien created by this statute is not confined to the costs of issuing the execution, but covers all the costs of the action.

The section of the Ontario Judicature Act, 1881, s. 43, which provides that in cases where the amount in controversy is under \$1,000 no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada except by leave of a judge of the former court, is *ultra vires* of the legislature of Ontario, and not binding on this court.

Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal.

Clarkson v. Ryan.—xvii. 251.

14. Debtor and creditor—Assignment in trust—Release by—Authority to sign—Ratification—Estoppel.

To an action by L. against A. the defence was release by deed. On the trial it was proved that A. had executed an assignment for benefit of creditors and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for \$800." * * * In April, 1885, A. wrote a letter to L., in which he said:

"In one year more I will try again for myself and I hope to pay you in full." In November, 1886, the account sued upon was stated.

Held, reversing the judgment of the court below, Taschereau and Patterson, JJ., dissenting, that the execution of the deed on his behalf being made without sufficient authority, L. was not bound by the release contained therein, and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it.

Assignment—Continued.

Held, per Taschereau and Patterson, JJ., that though A. had no sufficient authority to sign the deed, yet there was an agreement to compound which was binding on L., and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A., who could only receive the dividends realized by the estate.

Lawrence v. Anderson. —xvii. 349.

15. For benefit of creditors—Construction of R. S. O. (1887) c. 124, s. 2—Preference—Intent—Pressure—Criminal liability.

R. S. O. (1887) c. 124, s. 2 makes void any conveyance of property by a person in insolvent circumstances made "with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect."

Held, affirming the judgment of the Court of Appeal, (Fournier and Patterson, JJ., dissenting), that the words "or which has such effect" in this section apply only to the case of "giving any one or more of (his creditors) a preference over his other creditors or over any one or more of them."

Held, further, that the preference provided against in the statute is a voluntary preference and a conveyance obtained by pressure from the grantee would not be within its terms.

W. having become insolvent, and wishing to secure to an estate of which he was an executor, monies which he had used for his own purposes, gave his co-executors a mortgage on his property for the purpose, and proceedings were taken by a creditor to set aside this mortgage under the above section.

Held, Fournier and Patterson, JJ., dissenting, that the mortgage was not void under the statute.

Held, per Strong, Taschereau and Gwynne, JJ., that there was no preference under the statute as the persons for whose benefit the security was given were not creditors of the grantor, but they stood in the relation of trustee and *cestui que trust*.

Held, also, *per* Strong and Taschereau, JJ., that the grantor being criminally responsible for misappropriating the money of the estate of which he was executor, the fear of penal consequences was sufficient pressure on him to take from the mortgage the character of a voluntary preference.

Molsons Bank v. Halter.—xviii. 88.

16. For benefit of creditors—Bill of sale—Defective affidavit—Absence of date and words "before me"—R. S. N. S. 5th Series, c. 92, ss. 4 & 10.

See CHATTEL MORTGAGE, 11.

17. For benefit of creditors—Fraudulent preference—R. S. O. 1877, c. 118—48 V. c. 26, s. 2 (O.).

One N. owed defendants a sum of money which he was unable to pay in full, and he assigned to defendants all his book debts and accounts, the assign-

Assignment—Continued.

ment providing that the book debts should be placed in the hands of a firm of financial agents for collection, who should account to the defendants for the proceeds less the commission, and whatever amount remained in defendants' hands after their debts were paid should be paid over to N. Plaintiffs, judgment creditors of N., brought an action to set aside this assignment as having the effect of hindering, delaying and defeating them in the recovery of their claim and giving defendants a preference over other creditors, and so being void under R. S. O. 1877, c. 118, as amended by 48 V. c. 26, s. 2 (O.).

Held, affirming the judgment of the Court of Appeal for Ontario, 15 Ont. App. R. 324, and of the Divisional Court, 14 O. R. 288, (Gwynne, J., dissenting), that N. being unable to meet the demands of his creditors for payment must be deemed insolvent within the meaning of the said Act; that book debts are a species of property included in the provisions of 48 V. c. 26, s. 2 (O.), and that the assignment by N. to the defendants was void under that section.

Present:—Strong, Fournier, Taschereau and Gwynne, JJ.

Klopfcr v. Warnock.—xviii. 701.

18. Assignment of chose in action—Right of assignee to sue—
Notice to be given debtor—R. S. N. S. 4th Series, c. 94,
ss. 355 & 359.

See NOTICE, 15.

LIMITATIONS, 12.

19. Assignment in trust for creditors—Action to set aside—Refusal
by Judge to instruct jury as to what constitutes fraud under
Statute of Elizabeth—Taking accounts—Misdirection—
New trial.

See PRACTICE, 20.

20. Agent of bank discounting drafts and using funds in business
of his firm—Assignment by firm in trust—Drafts, "debts
due and owing" from insolvents to bank.

See BANKS AND BANKING, 24.

21. *Of personal property—Preference by—Pressure—Intent—49
V. c. 45, s. 2 (Man.).*

By the Manitoba Act 49 V. c. 45 s. 2, "Every gift, conveyance, etc., of goods, chattels or effects * * * made by a person at a time when he is in insolvent circumstances * * * with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void."

Held, Patterson, J., dissenting, that the word "preference" in this Act imports a voluntary preference, and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Assignment—Continued.

Held, further, that a mere demand by the creditor without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the Act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the Act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank v. Halter*, 18 Can. S. C. R. 88 (*See Assignment 15*) approved and followed.

Held, *per* Patterson, J., that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute whether or not it is the voluntary act of the debtor or given as the result of pressure.

Stephens v. McArthur.—xix. 446.

22. Of chose in action—Parties to suit—Demurrer—*Res judicata*.
See PRACTICE, 25.

23. *Insolvency—Claim against insolvent—Notes held as collateral security—Pledge—Collocation—Joint and several liability.*

Held, affirming the judgment of the court of Q. B. for L. C. (appeal side), that a creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of certain goods and promissory notes endorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realized upon the goods.

Fournier, J., dissenting, on the ground that the notes having been endorsed over to the creditor, as additional security, all the parties thereto became jointly and severally liable, and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of his co-debtors for the full amount of his claim until he has been paid in full without being obliged to deduct therefrom any sum received from the estates of the co-debtors jointly and severally liable therefor.

Gwynne, J., dissenting, on the ground that there being no insolvency law in force the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment, to collocate the appellants upon the whole of their claim as secured by the deed.

Benning v. Thibaudeau.—xx. 110.

24. *Mortgage—Preference by—Pressure—R. S. O. (1887) c. 124, s. 2.*

A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors

Assignment—Continued.

if given as a result of pressure and for a *bond fide* debt, and if the mortgagee is not aware of the debtor being in insolvent circumstances. *Molsons Bank v. Halter*, 18 Can. S. C. R. 88, and *Stephens v. McArthur*, 19 Can. S. C. R. 446, followed.

Gibbons v. McDonald.—xx. 587.

Attachment—Under Absent and Absconding Debtors Act of Nova Scotia, chapter 97, R. S. N. S.

See CORPORATIONS, 5.

2. For contempt of court—Practice—Appeal from judgment—Jurisdiction—R. S. C. c. 135, s. 24 (u).

See JURISDICTION, 53, 107.

Attorney—Appearance by without authority.

See OPPOSITION, 2.

2. Of mortgagee — Power of — Sale of mortgaged lands — Application of proceeds—Duty of purchaser.

See MORTGAGE, 21.

3. *Ad litem*—Agreement not to appeal.

See JURISDICTION, 95.

4. Power of Attorney—Construction of Authority to settle and adjust claim—Authority to receive payment.

See POWER OF ATTORNEY, 3.

5. *Authority to enter appearance—Ratification—Disavowal of.*

In an action brought in 1866 for the sum of \$800 and interest at 12½ per cent. against two brothers, J. S. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of J. S. D. at Three Rivers, the other defendant, W. McD. D., then residing in the state of New York. On the return of the writ, the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874 when judgment was taken, and in December, 1880, upon the issue of an *alias* writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J. S. D., saying: "Be so good as to file an appearance in the case to which the enclosed has reference, etc." and also pleaded prescription, ratification and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed.

Held, that there was no evidence of authority given to the respondent or of ratification by appellant of respondent's act, and therefore the petition in disavowal should be maintained.

Dawson v. Dumont.—xx. 709.

Attorney—Continued.

6. Application to be admitted as—Refusal of court below to grant—Appeal—Security for costs—Final judgment—Jurisdiction.

See JURISDICTION, 100.

7. *Bill of costs—Order for taxation—R. S. O. 1887 c. 147, s. 42—Appeal—Jurisdiction.*

In an action brought against school trustees, judgment was obtained. A ratepayer of the district applied to a judge of the High Court of Justice for Ontario, under section 42 of chapter 147, R. S. O. (1887), to tax the bill of the solicitor of the plaintiff.

Held, *per* Ritchie, C.J., and Strong and Patterson, JJ., affirming the judgment of the Court of Appeal for Ontario, that a ratepayer is not entitled to an order for taxation under said section.

Held, also, *per* Ritchie, C.J., and Strong and Gwynne, JJ., that assuming the court had jurisdiction, the subject matter was one in which the Supreme Court should not interfere.

Held, further, *per* Taschereau and Patterson, JJ., that there was no jurisdiction to entertain the appeal.

McGugan v. McGugan.—xxi. 267.

See, also, JURISDICTION, 101.

8. *Costs—Quantum meruit—Supreme and Exchequer Courts.*

In proceedings before the Supreme and Exchequer Courts of Canada an Attorney has the right to establish the *quantum meruit* of his services by oral evidence in an action for his costs.

Paradis v. Bosse.—xxi. 419.

9. *Bill of costs—Set off—Mutual debts—Special services.*

Held, affirming the judgment of the Court of Appeal for Ontario, that in an action by a firm of attorneys for costs due from clients the clients cannot set off against the plaintiffs' claim a sum paid by one of them to one of the attorneys for special services to be rendered by him, there being no mutuality, and the payment not being for the general services covered by the retainer to the firm.

McDougall v. Cameron }
Bickford v. Cameron } xxi. 379.

10. *Ad litem*—Promise of indemnity to sheriff by, in course of suit—Adoption by client.

See APPEAL, 18.

Attorney General—Delegation of authority by.

See CRIMINAL APPEAL, 1.

2. Of Province—Proper person to bring a suit for administration of charitable trust.

See CHARITABLE TRUST.

Auctioneer—Liability of, to assignees of bill of lading.

See BILL OF LADING.

B.

Bail—*Capias*—Bail entered—Order for discharge of—In discretion of court below and a matter of practice in which no appeal.

See JURISDICTION, 61.

Bail Bond—Altered after execution.

See BOND, 4.

Bailee—Right to hold goods for unpaid purchase money.

See SALE OF GOODS, 5.

Bailment—Railway company—Carriage of goods—Contract—Carriage beyond terminus—Loss after transit—Delivery to connecting line.

See RAILWAYS AND RAILWAY COMPANIES, 43.

Ballots.

See ELECTION, 12, 16.

Banks and Banking—*The Banking Act, 34 V. c. 5, s. 40—Advances on real estate.*

B., on the 19th January, 1876, transferred to the Bank of T. (appellants) by notarial deed an hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B.'s credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C. to set aside a prior hypothec given by C. and to establish their priority.

Held, affirming the judgment of the Court of Queen's Bench, that the transfer of B. to the Bank of T. was not given to secure a past debt, but to cover a contemporaneous loan, and was, therefore, null and void, as being a contravention of the Banking Act, 34 V. c. 5, s. 40.

Bank of Toronto v. Perkins.—viii. 608.

2. Right to transfer shares under Banking Act.

See CORPORATIONS, 10.

3. Liability for money deposited for benefit of creditors.

See AGREEMENT, 7.

4. *Creditor and debtor—Relation of—Agency—Payment—C. C. Art. 1143—Parties.*

S. G. acquired during the life of his first wife, M. A. B., certain immovable property, which formed part of the *communauté de biens* existing

Banks and Banking—Continued.

between them. At his death, after his marriage with H. S., his second wife, he was greatly involved. His widow, H. S., having accepted *sous bénéfice d'inventaire* the universal usufructuary legacy made in her favour by S. G., continued in possession of her estate as well as that of M. A. B., the first wife, and administered them both, employing one G. to collect, pay debts, etc. Shortly afterwards, at a meeting of the creditors of S. G., of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to the estate of S. G. with the advice of an advocate and the cashier of the respondents, and promising to ratify anything done on their advice, and the creditors resolved that the money derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned among S. G.'s creditors *pro rata*. G. continued to collect the fruits and revenues and rents, and acted generally for H. S. and under the advice aforesaid, and deposited both the moneys derived from the estate of S. G. and those derived from the estate of M. A. B., the first wife, with the respondents, under an account headed "Succession S. G." A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of dame M. A. B.

Held, per Strong, Taschereau and Gwynne, JJ., (Ritchie, C.J., and Fournier and Henry, JJ., contra)—That as between the heirs B. and the bank there was no relation, of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by G. belonging to the heirs of B. were so collected by him as the agent of H. S., and not as the agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate of S. G., and as the representatives of H. S. were not parties to the action, the appellants could not recover the moneys sued for.

Giraldi v. La Banque Jacques Cartier.—ix. 597.

5. Deposit for special purpose.

See NEW TRIAL, 4.

6. Winding up under the Imperial Companies Act, 1862—Calls upon past member—Right of action.

See CORPORATIONS, 15.

7. Bank, Insolvent—Winding up—Contributories—Shareholders—Double liability—45 V. c. 23 (D.).

In the year 1855, the bank of Prince Edward Island was incorporated by Provincial statute, 18 V. c. 10. Its capital stock was thereby fixed at £30,000 P. E. I. Cy., or \$97,333.33 Dominion Cy., divided into shares of £10, or \$32.44. Power to increase this capital by the issue of additional shares, of same value, was given by sections 39, 40, 41 & 42 of the Act, and these sections prescribed the manner of effecting this increase, and the sale of the new stock by auction, and it was provided by section 48 that "the said additional shares shall be subject to all the rules, regulations and provisions to which the original stock

Banks and Banking—Continued.

is subject, or may hereafter be subject, by any law of this Island." The 19th section of the Act was repealed, and re-enacted by the 8rd section of 19 V. c. 11, as follows:—

"The holders of the stock of the said bank shall be chargeable in their private and individual capacity, and shall be holden for the payment and redemption of all bills which may have been issued by the said corporation, and also for the payment of all debts at any time due from the said corporation, in proportion to the stock they respectively hold, provided however, that in no case shall any one stockholder be liable to pay a sum exceeding twice the amount of stock actually then held by him, over and above, and in addition to the amount of stock actually by him paid into the bank, provided nevertheless, that nothing in this Act, or in the said hereinbefore recited Act contained, shall be construed to exempt the Joint Stock of the said corporation from being also liable for, and chargeable with, the debts and engagements of the same."

No increase to the capital stock was ever made under the provisions of this Act. In 1872, the bank having a balance of net profits on hand of \$27,286.41, pursuant to a resolution passed at the general annual meeting of the shareholders, application was made to the legislature, and the statute 35 & 36 Vic. c. 23 was passed, which enacted as follows:

1. "It shall and may be lawful for the board of directors of the Bank of Prince Edward Island at any time, and from time to time, to enlarge the capital stock of the said bank by applying to each individual share of the capital a portion of the rest or surplus profits, lying at the time at the credit of the said bank." 2. "Such mode of enlarging the capital stock of the said bank shall not prevent the enlargement of the same by the mode pointed out in the 39th, 40th, 41st, 42nd and 43rd sections of the Act of Incorporation of the said bank."

In 1872, the sum of \$10,666.67 was taken out of the profits and added to the capital stock, raising the value of each share by the sum of \$3.55 and a fraction, or to a total par value of \$36.

In 1875, a further sum of \$12,000 out of profits was carried to the credit of capital stock. This addition made the capital \$120,000, and the par value of each share \$40.

On the 19th day of June, 1882, an order was made by Mr. Justice Peters for winding up the said bank, which had become insolvent within the meaning of the Act, 45 V. c. 23, intituled "An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations," and the respondents were appointed liquidators of the said bank. Subsequently an order *nisi* was granted by Mr. Justice Peters calling upon all shareholders to show cause why they should not pay calls upon their shares to the amount of \$90 for each share, which order he made absolute after hearing counsel for the appellants, contributories. On appeal to the full Supreme Court of P. E. I. this order absolute was formally confirmed, two of the Judges thinking themselves disqualified from hearing the appeal in any other than a merely formal manner.

Banks and Banking—Continued.

On the 10th Feb., 1883, Strong, J., of the Supreme Court of Canada made an order under 45 V. c. 23, granting leave to appeal to that court, which Held, reversing the decision of Peters, J., that the shareholders were not liable to pay more than \$64.89 per share, or twice the amount of their original stock. The Act of 1872, which authorized the alleged increase, had no provision creating any double liability, as was imposed on the original stock, and any new stock which might have been created under 18 V. c. 10, and the fair inference from the omission of any express enactment with reference to the increased stock was that the legislature did not intend to clothe it with a double liability. Gwynne, J., dissenting.

Appeal allowed with costs.

Morris v. The Liquidators of the Bank of P. E. Island.—19th June, 1883.

8. *Shareholders or contributory of bank—Action against—Right of set-off—Demurrer—45 V. c. 23, s. 76 (Winding-up Act)—Construction of.*

An action was brought by the Bank of P. E. I. against the appellant on a promissory note, to which he pleaded set off of a draft made by the plaintiffs and endorsed to him. To this there was a replication that the defendant was a contributory on the stock book of the bank, and knew that the bank was insolvent when the draft was purchased. The defendant demurred on the ground that the replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as shareholder or contributory.

Held, reversing the judgment of the Supreme Court of P. E. I., that the replication was bad in law. 45 V. c. 23, s. 76.

J. I., the appellant, gave to one O. his note for \$6,000, which was endorsed to the bank of P. E. I. The Union Bank of P. E. I. at the time held a check or draft, made by the bank of P. E. I. for nearly the same amount, and this draft the appellant purchased for something more than \$200 less than its face value. Being sued on the note he set off the amount of such check or draft and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable and he also admitted that, if he could succeed in his set-off, and another party could succeed in a similar transaction, the Union Bank would get their claim against the bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set-off, he could not do so, because he was a contributory within the meaning of the 76th section of the Winding-up Act, and that the Act which came into force on the 12th May, 1882, was retrospective as regards the endorsements before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury, under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb.

On appeal to the Supreme Court of Canada, Held, reversing the judgment of the court below, that the appellant having purchased the draft in question

Banks and Banking—Continued.

for value and in good faith prior to the 26th May, 1882, the Canada Winding-up Act, 45 V. c. 23, was not applicable, and, therefore, the appellant was entitled to the benefit of his set-off. That the Winding-up Act was not retrospective as to this endorsement.

By sections 75 & 76 of 45 V. c. 23, it is provided that if a debt due or owing by the company has been transferred within thirty days next before the commencement of the winding up under that Act, or at any time afterwards to a contributory who knows, or has probable cause for believing, the company to be unable to meet its engagements, or in contemplation of insolvency under the Act, for the purpose of enabling such contributory to set up by way of compensation or set-off the claim so transferred, such debt cannot be set up by way of compensation or set-off against the claim upon such contributory.

Held, that the sections in question only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory.

Ings v. The Bank of P. E. Island.—22nd June, 1885.—xi. 265.

9. Assessment of Bank under St. John City Assessment Act, 45 V. c. 59 (N.B.).

See ASSESSMENT AND TAXES, 11.

10. Transfer to Bank of shares held in trust—Notice—Obligation to account.

See TRUSTS AND TRUSTEES, 9, 14, 18, 20, 23.

11. Insolvent Bank—Winding up—Priority of Crown over simple contract creditors.

See CROWN, 15.

12. *Advances, security taken for in the name of a third person—
Right of bank to lien on shares—Claim in insolvency—
Liability for mal-administration—Interest—Commence-
ment of proof in writing.*

In 1875 the plaintiff, Lamoureux, became insolvent and made an assignment of his estate to one Anger, an official assignee. The claims filed against his estate amounted in all to the sum of \$93,105.78 of unprivileged debts, and \$895.92 of privileged debts. Among other claims was one by the Bank of St. Johns, party defendant, sworn to by Mr. L'Ecuyer, their then cashier, on the 5th of February, 1876. This claim was for \$41,431.41, and it was stated that the bank held no security except certain shares owned by the plaintiff of the stock of said bank, valued at \$18,000. It appears that the claim was based entirely upon promissory notes, eighteen of which, amounting to \$11,788.71, had not then matured, the remainder being overdue. A large number of these notes, amounting in all to \$24,500, were endorsed by the said

Banks and Banking—Continued.

cashier, who, it appears, held a hypothec on the property of the plaintiff to the extent of \$80,000 to secure him against his said endorsements.

The plaintiff compounded with his creditors for the sum of twenty-five cents in the dollar, and the defendants, the Bank of St. Johns, were placed on his dividend sheet for the amount of their alleged unsecured debt, viz., \$23,481, the composition on which would be \$5,857.86. The plaintiff, not having the amount required to pay the composition to his creditors, in all a sum of \$24,178.68, entered into negotiations with the defendant Molleur for the purpose of procuring it. The extent and nature of the negotiations form the subject of the present contention. They resulted in the execution of a deed dated the 16th May, 1876, made between the plaintiff, his assignee, and the defendant Molleur, whereby it was recited that the plaintiff had received from the defendant Molleur the sum of \$25,251.55 for the purpose of paying the composition to his creditors and for securing repayment of this sum, together with a bonus of \$4,000, as one of the considerations for said advance. The plaintiff requested the assignee to, and the assignee thereby did, assign and transfer to the defendant Molleur all the property belonging to the plaintiff. The defendant Molleur was also to be paid the costs and expenses connected with the administration of the property. Molleur continued to deal with the property of the plaintiff until 1879, when the plaintiff brought this action, alleging the facts hereinbefore set forth, and alleging further that at the time of the execution of the deed of the 16th May, 1876, Molleur was acting as the *prête nom* or *locum tenens* of the other defendants, the Bank of St. Johns; that the bank and not Molleur had advanced the sum of \$25,251.55 mentioned in the deed; that although it had been agreed between the plaintiff and the defendant Molleur that only the said sum of \$25,251.55, together with a bonus of \$4,000, should be paid to the bank, and upon such payment being made Molleur should re-transfer to the plaintiff the property remaining in his possession, the defendant Molleur had wrongfully paid to the bank the claim against his estate in full, and had also so improperly managed the estate as to cause the plaintiff considerable loss. The plaintiff asked that the defendant Molleur should render an account of his administration, that the bank might be declared to be equally responsible with the defendant Molleur, who should be held to be merely the *locum tenens* of the bank, that the defendants jointly should be obliged to repay to him the balance of monies which they had received, after paying the amounts which were authorized by the said deed of the 16th May, 1876, and that Molleur should also be obliged to re-assign to the plaintiff the balance of the plaintiff's property then unsold.

In the course of the proceedings Molleur by his pleas denied that the properties belonging to the plaintiff were assigned to him to pay only the sums mentioned by the plaintiff; he denied that he was the *locum tenens* of the bank; and he alleged that at the time of the execution of said deed it was agreed between the plaintiff and himself, that besides the said sums the defendants should pay to the bank in full the balance remaining due to said bank on the claim filed against the plaintiff beyond the amount of the composition, such balance, amounting to \$85,578.56, having necessarily to be paid to discharge the hypothec held by the endorsers of the plaintiff's notes.

Banks and Banking—Continued.

The total amount which by the defendant Molleur's contention would thus have to be paid out of the proceeds of the plaintiff's property would be the sum of \$64,825.11, together with the expenses of management, and the defendant also claimed that the plaintiff agreed to pay interest on the various sums at the rate of 9 per cent. per annum. He stated that up to that time he had paid to the bank, and on hypothecary claims on the property and for expenses of management, the sum of \$62,977.85; he admitted having received from the revenues and sale of portions of the property a sum of \$49,638.09, and having sold another portion of said property for \$1,000 which he had not yet received. The defendant went into particulars with respect to his dealings with certain portions of the property. The result would have been that a considerable balance would still have appeared owing to the bank of St. Johns, if the contention of the defendant Molleur was correct. The defendant filed with his pleas certain statements of account. To these the plaintiff objected as not having been sworn to, as required by law, and he reiterated his contentions with respect to the agreement between him and the defendant Molleur.

On the 20th May, 1882, the Superior Court of the district of Iberville, Chagnon, J., presiding, by an interlocutory judgment, Held, that the defendant Molleur was the *locum tenens* of the bank, and that the said defendant should render a proper sworn account. This the defendant Molleur did, not only of his dealings with the property up to the time of the institution of the action, but also up to the date of rendering said accounts, the 15th August, 1882, and he claimed that a balance was still due to him of \$3,814.18.

On the 29th January, 1883, Mr. Justice Chagnon delivered judgment in which he re-affirmed his previous finding, that the defendant Molleur was the *prête nom* or *locum tenens* of the bank. He held, also, that the defendant Molleur was justified in paying to the bank the amount of the notes for which they held the endorsement of L'Ecuyer, there being no evidence that the hypothec held by L'Ecuyer was not a *bona fide* security of which the bank had a right to the benefit; that the bank was justified in retaining the shares of the plaintiff to be applied on the balance of its claim; that the bank was entitled also to the sum of \$25,251.55, together with the amount of the bonus of \$4,000, and to interest on all the amounts it was thus declared entitled to at the rate of 6 per cent. per annum, with the exception of the said bonus, upon which the judge considered no interest should be paid; that, as regards the amount alleged to have been improperly paid the assignee, the plaintiff must be left to his recourse against the assignee, or his estate, he being then dead; that, as regards any questions of mal-administration, the recourse of the plaintiff, if any, should be reserved to him; and the court directed the accounts to be submitted to an auditor to ascertain the balance on the principles laid down in the judgment, and also directed that if a balance should be payable by the defendants the defendant Molleur should re-assign to the plaintiff the balance of property remaining unsold.

The auditor found a balance in favour of the plaintiff of \$3,200.60.

Neither party being satisfied with this judgment, appeals were instituted to the Court of Queen's Bench, which court reversed the finding of Mr.

Banks and Banking—Continued.

Justice Chagnon on the question of the relation between the bank and Molleur, holding that Molleur was not the *locum tenens* of the bank, and reversed his finding with respect to the rate of interest. In other respects it practically affirmed the judgment of the Superior Court, and sent the case back to that court to have the account rectified in accordance with suggestions in their judgment.

Held, by the Supreme Court of Canada, that the judgment of Mr. Justice Chagnon should be affirmed, with the exception hereafter mentioned. The evidence was ample to lead to the conclusion, beyond any reasonable doubt, that the defendant Molleur was acting as the *prête nom* or *locum tenens* of the bank. The only difficulty with regard to this point was created by the fact that there was no writing to connect the bank with the deed of the 16th May, 1876, no *commencement de preuve par écrit*. But this difficulty was not insuperable:—1st. Because, if held as a bar to considering the bank as the real party liable, the bank would be enabled to commit a fraud upon the plaintiff and to receive and retain monies to which it was not entitled. And secondly, because the bank, by its actions and conduct throughout, had shown ample ratification of the acts of the defendant Molleur, and an acceptance of the deed of the 16th May, 1876, and of everything done under it. Whether as the principal party concerned, acting through its *locum tenens*, or by reason of its having received monies by collusion with the defendant Molleur to which it was not entitled, the bank should be held equally responsible with the defendant Molleur.

With reference to the L'Ecuyer notes, the bank did not, these notes being over-due, treat the hypothec taken by L'Ecuyer as any security to it when filing its said claim, nor did it appear that the plaintiff ever contended at the meeting of his creditors, or in any of the insolvency proceedings, that this hypothec given to Mr. L'Ecuyer was in reality held for the bank. Nor was there any evidence to the effect that the plaintiff subsequent to the insolvency proceedings, and up to the time of the institution of this action, ever contended that this hypothec was held by the bank, or held otherwise than as a *bond fide* security by Mr. L'Ecuyer himself, and as a security, therefore, which the defendant Molleur was bound to pay off to release the properties. On the other hand, there was considerable evidence that the plaintiff acknowledged his liability on this hypothec, and wished the defendant Molleur to pay off the indebtedness for which it was given. The judge of the Superior Court was justified in holding that the defendant had properly paid the amount of the promissory notes endorsed by L'Ecuyer in order to obtain the discharge of his hypothec.

Further, the bank in filing its claim, was justified in alleging that it held as security only the shares of the plaintiff, and that it was further justified in applying the proceeds of these shares to any balance remaining due on the notes of the plaintiff after payment of the L'Ecuyer notes.

The Court of Queen's Bench should not have raised the rate of interest to eight per cent., no rate having been mentioned in the deed of the 16th May, 1876.

Banks and Banking—Continued.

There was one point, however, in the judgment of the learned judge of the Superior Court from which the court was obliged to dissent. At the time the deed of the 16th of May, 1876, was executed there were, as already stated, certain claims being contested before the assignee. The amount of these claims should not have been paid to the assignee before the result of the contestations was declared, or, if paid, the defendants should have taken proceedings in the interest of the plaintiff to recover back this amount from the assignee. This amount the plaintiff was entitled to, in addition to the sum found by the auditor on the basis of the judgment of the Superior Court.

In all other respects the judgment of the Superior Court should be affirmed and the appeal of the plaintiff allowed with costs, and the cross appeals dismissed with costs, the plaintiff to receive his costs on the appeal and cross appeals in the Court of Queen's Bench.

Lamoureux v. Mollereux.—8th March, 1886.

[In this case the judicial committee of the Privy Council refused leave to appeal.]

13. Winding-up of insolvent bank—Winding-up Act, 45 V. c. 23, as amended by 47 V. c. 39.

See WINDING-UP, 6.

14. *Surety—Cashier of bank—Misconduct of—Illegal transactions—Proper banking business—Sanction of directors.*

The sureties of an absconding bank cashier are not relieved from liability by showing that the bank employed their principal in transacting what was not properly banking business, in the course of which he appropriated the bank funds to his own use, the claim against the sureties being for the moneys so appropriated by the principal, and not for losses occasioned by such illegal transactions.

Springer v. Exchange Bank of Canada—Barnes v. the same.—xiv. 716.

15. *Surety—Mortgage to bank—Continuing security—Present indebtedness of principal—Commercial paper—Mode of dealing by bank—Taking forged paper in renewal.*

McK. gave a mortgage to the M. Bank as security for the present indebtedness of, and future advances to, a customer of the bank. By the terms of the mortgage McK. was to be liable, amongst other things, for the promissory notes, etc., of the customer outstanding at the date of the mortgage, and all renewals, alterations, and substitutions thereof.

Held, *per Ritchie, C.J., Fournier and Taschereau, JJ.*, that the bank having given up the said promissory notes, etc., and accepted as renewals thereof, forged and worthless paper, McK. was, to the extent of such worthless paper, relieved from liability as such surety.

Banks and Banking—Continued.

Held, per Strong, J., that the bank, having accepted the renewals in the ordinary course of banking business, and it not being shown that they were guilty of negligence, the surety was not relieved.

Held, per Gwynne, J., that as there was a reference ordered to take an account of the notes alleged to be forged, the consideration of the surety's liability should be postponed until the account was taken.

Merchants' Bank of Canada v. McKay.—xv. 672.

16. Shareholders in bank—Winding-up—R. S. C. c. 129—Contributory, calls on—Double liability—Set-off.

See WINDING-UP, 7.

17. Shares—Suit respecting—Matter in controversy—Actual value of shares—Right to establish by affidavit.

See PRACTICE OF SUPREME COURT, 117.

18. *The Banking Act*—R. S. C. c. 120, s. 53 *et seq.*—Warehouse receipts—Parol agreement as to surplus—Arts. 1031, 1981, C. C.

The Molsons Bank took from H. & Co. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. & Co. H. & Co. having become insolvent, T., as one of the creditors, brought an action against the bank, claiming that the surplus must be distributed ratably among the general body of creditors. H. & Co. were not made parties to the suit.

Held, affirming the judgment of the courts below, that the parol agreement was not contrary to the provisions of the Banking Act, R. S. C. c. 120, and that after the goods were lawfully sold, the money that remained, after applying the proceeds of each sale to its proper note, could properly be applied by the bank under the terms of the parol agreement. (Ritchie, C.J., doubting, and Fournier, J., dissenting).

Per Taschereau, J.—That H. & Co. ought to have been made parties to the suit.

Thompson v. The Molsons Bank.—xvi. 664.

19. Insolvent Bank—Assets—R. S. C. c. 120—Prerogative of Crown—Priority of note-holders.

See CROWN, 21.

20. Payment of cheque by bank—Joint payees—Endorsement by one—Authority.

See PARTNERSHIP, 15.

Banks and Banking—Continued.

21. Discount of note by bank—Partner in two firms—Use of name of one for purposes of the other—Notice to Bank.

See PARTNERSHIP, 16.

22. Forged bill, bank cannot recover on.

See FORGERY, 8.

23. Winding-up Act—R. S. C. c. 129—Insolvent bank—Appointment of liquidators—Right to appoint another bank—Discretion of judge.

See WINDING UP, 10.

24. *Bank—Agent of—Excess of authority—Dealing with funds contrary to instructions—Liability to bank—Discounting for his own accommodation—Position of parties on accommodation paper.*

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank which he discounted as such agent, and without indorsing the drafts, used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty as creating a debt due to it from his firm, the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment—

Held, affirming the judgment of the Supreme Court of Nova Scotia, (Gwynne, J., dissenting), that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per Ritchie, C.J.—K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm and when the firm received that money they became debtors to the bank for the amount.

Per Strong and Patterson, JJ.—The agent being bound to account to the bank for the funds placed at his disposal, he became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. Whether or not the bank had a right to elect to treat the act of the agent as a tort was not important as in any case there was a debt due.

Banks and Banking—Continued.

Per Gywnne, J.—The evidence does not establish that these drafts were anything else than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper and were not obliged to look to any other for payment.

The Merchants Bank of Halifax v. Whidden.—xix. 53.

25. *Bank stock given to another bank as collateral security—Banking Act, 34 V. c. 5, s. 40—42 V. c. 45 s. 2—35 V. c. 51 (D.)—43 V. c. 22, s. 8—46 V. c. 20, ss. 9 & 10—Arts. 14, 1970, 1973, 1975 C. C.*

The Exchange Bank in advancing money to F. on the security of Merchants' Bank shares caused the shares to be assigned to their managing director and an entry to be made in their books that the managing director held the shares in question on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on the managing director pledged these shares to another bank for his own personal debt and absconded.

Held, affirming the judgment of the court of Queen's Bench for L.C. (appeal side), that upon repayment by F. of the loan made to him, the Exchange Bank was bound to return the shares or pay their value. The prohibition to advance upon security of shares of another bank contained in the amendment to the general Banking Act applies to the bank and not to the borrower.

Per Patterson, J.—Assuming that the subsequent amendment of the general Banking Act forbade the taking of such security by any bank, the amendment did not alter the charter of the Exchange Bank, 35 Vic. c. 51 (D.), under which the Exchange Bank had power to take the shares in question in its corporate name as collateral security. To take such security may have become an offence against the banking law, punishable from the beginning as a misdemeanour and subject to a pecuniary penalty, but it was not *ultra vires*. Art. 14 C. C. which declares that prohibitive laws import nullity has no application to such a case.

The Exchange Bank v. Fletcher.—xix. 278.

26. *Incorporation of the Trustees of the Bank of Upper Canada—31 V. c. 17 (D.); 33 V. c. 40 (D.)—Validity of—B. N. A. Act 1867, s. 91—Right of legislation by Parliament as to insolvent bank.*

See PARLIAMENT OF CANADA, 12.

27. *Shares held in trust—Substitution—Registry—Arts. 931, 938, 939, 1047, 1048, C. C.*

See TRUSTS AND TRUSTEES, 20.

Banks and Banking—Continued.**28. Deposit with bank after suspension.**

A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

The Ontario Bank v. Chaplin.—xx. 152.

And see INSOLVENCY, 26.

**29. Stock—Transfer of, to manager of bank or company “in trust”
—Duty of transferee to make inquiry.**

See TRUSTS AND TRUSTEES, 23.

**30. Compounding felony—Embezzlement of bank funds by agent
—Security to bank—Bond—Consideration—Agreement not
to prosecute.**

See CONTRACT, 57.

**31. Bank Act, R. S. C. c. 120, s. 79—Lien on assets—Priority of
note-holders—53 V. c. 31, s. 53.**

Under section 79 of the Bank Act, R. S. C. c. 120, the note-holders have the first lien on the assets of an insolvent bank in priority to the Crown. Strong and Taschereau, J.J., dissenting.

[But see the present Bank Act, 53 V. c. 31, s. 53, passed since this decision.]

Liquidators of the Maritime Bank v. the Receiver-General of New Brunswick. —xx. 695.

**32. Bank cheques—Acceptance by cashier and president at a
future date—Liability of Bank.**

In 1881 G., having business transactions with the Exchange Bank, agreed with C., president and manager of the bank, that in lieu of further advances, the bank would accept his cheque, but made payable at a future date. On the 19th October, 1881, G. drew a cheque on the Exchange Bank, and after having it accepted as follows: “Good on 19th February, 1892, T. Craig, president,” got the cheque discounted by the People’s Bank, and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on the 23rd of May, and it was presented at the Exchange Bank and paid. Thereupon another cheque for the same amount was accepted in the same way and discounted by the People’s Bank on the 7th September, 1883. At the time of the suspension of payment by the Exchange Bank, the People’s Bank had in its possession four cheques signed by G. and accepted by T. Craig, president of the Exchange Bank, which were subsequently presented for payment on the dates when they were payable and duly protested.

The total of these cheques amounted to \$66,020.64 and one of them, viz., the one dated 7th September, 1883, for \$31,000, was a renewal of the cheque the proceeds of which had been paid to the credit of G. in the

Banks and Banking—Continued.

Exchange Bank. C. was manager as well as president of the Exchange Bank.

On an action brought by the People's Bank against the Exchange Bank for the recovery of the sum of \$66,020.64, based on the four cheques in question, the Exchange Bank pleaded, *inter alia* that C. had not acted within the scope of his duties and within the limits of his powers, and that the bank had never authorized or ratified his acceptance of G.'s cheques.

Held, *per* Ritchie, C.J., and Fournier and Henry, JJ., affirming the judgment of the Court of Queen's Bench for L. C., (Strong, Taschereau and Gwynne, JJ., *contra*), that under the circumstances the Exchange Bank was liable for the acceptance by their president and manager of G.'s cheques discounted by the People's Bank in good faith and in due course of business.

Appeal dismissed without costs.

Present: Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

The Exchange Bank of Canada v. The People's Bank.—23 C. L. J. 391
—22nd June, 1887.

33. Letter of guarantee by bank—Proof of loss—Account sales.

See GUARANTEE.

34. Railway bonds—Mortgage of, as security for advances made by bank—Mortgagees notes discounted by bank—Second mortgage—Purchase by—*Re* hypothecation of bonds to bank.

See RAILWAYS AND RAILWAY COMPANIES, 72.

WAREHOUSE RECEIPTS.

Barratry—Marine Insurance—Exceptions in policy—"Perils of the seas" does not cover a loss by barratry—Proximate cause of loss.

See INSURANCE, MARINE, 26.

Benefit Society—Expulsion of member—Prior notice not necessary under by-laws—Mandamus.

L. was expelled from membership in L'U. St. J., an incorporated benefit society, for being in default to pay six months' contributions. Article 20 of the society's by-laws, section 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the collector-treasurers to make known the names of those who are indebted in six months' contributions, or in a balance of their entrance fees, and then any one may move that such members be struck off from the list of members of the society." L. brought a suit under the shape of a petition, praying that a writ of mandamus should

Benefit Society—Continued.

issue, enjoining the company to re-instate him in his rights and privileges as a member of the society: 1. On the ground that he had not been put *en demeure* in any way; and that no statement or notice had been given him of the amount of his indebtedness. 2. On the ground that many other members of the society were in arrear for similar periods, and that it was not competent for the society to make any distinction amongst those in arrear. 3. On the ground that no motion was made at any regular meeting.

The Court of Queen's Bench for L. C. (appeal side) held that L. should have had "prior notice" of the proceedings to be taken with a view to his expulsion.

Held, on appeal, that as L. did not raise by his pleadings the want of "prior notice," or make it a part of his case in the court below, he could not do so in appeal.

Per Taschereau and Gwynne, JJ.—A member of that society, who admits that he is in arrear for six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues.

L'Union St. Joseph de Montreal v. Lapiere.—iv. 164.

Bill of Lading—Rights of assignee of—Right to instruct agent to hold until payment of bill of exchange drawn for goods mentioned in bill of lading — Whether instructions admissible in action against a third party—Consignee obtaining goods without Bill of Lading and without paying for goods—Liability of auctioneers to assignees of Bill of Lading for selling the goods on consignee's account—Trover—Interest.

The plaintiffs, a banking company doing business at Charleston, S. C., were assignees of a bill of lading for 100 casks of spirits of turpentine and 501 barrels of rosin, for which they had discounted the shipper's draft on R., of St. John, N.B., the consignee. They forwarded the draft to their agents with instructions to deliver the bill of lading to R. when the draft was paid. The draft was dated August 2, 1875, and was payable 20 days after date. R. accepted the draft, but did not pay the same, and the bill of lading was retained by plaintiffs' agents. The invoice was sent from Charleston to R., to whom the captain of the vessel by which the goods were shipped delivered the goods without the production of the bill of lading. Subsequently R. delivered 90 barrels of the turpentine to the defendants, who were auctioneers, for the purpose of being sold by the defendants on account of R., upon which they advanced R. \$1,000. The defendants, after advertising the sale, sold the turpentine at public auction and paid the balance of the net proceeds to R. on September 24, 1875. The turpentine had been taken out of the vessel and landed and warehoused several days before the delivery to defendants, and defendants did not know that R. had not possession of the bill of lading until October 21, 1875, when the plaintiffs, by notice in writing, demanded the turpentine of them.

Bill of Lading—Continued.

The Supreme Court of New Brunswick held, that the plaintiffs were entitled in an action of trover to recover from defendants the value of the turpentine, and gave interest on the amount to the plaintiffs from the day the demand was made. The court held also that the instructions from plaintiffs to their agents to deliver the bill of lading upon payment of the draft, was admissible evidence in an action by plaintiffs against the defendants. See 3 Pugs. & Bur. 268.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the court below should be affirmed. Appeal dismissed with costs.

Stewart v. The People's National Bank of Charleston.—10th June, 1880.

2. Sale with privilege of taking bill of lading or reweighing at sellers' expense.

See SALE OF GOODS, 12.

3. *Assignment of—Property in goods under—Stoppage in transitu—Replevin.*

H., of Souris, P.E.I., carried on the business of lobster packing, sending his goods to M., of Halifax, N.S., who supplied him with tin plates, etc. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef *via* Pictou and I. C. R., addressed to M. The bill of lading for this shipment was sent to M., and provided that the goods were to be delivered at Pictou, to the freight agent of the I. C. R. or his assigns, the freight to be payable in Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM., to secure accommodation acceptances. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I. C. R. not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax for the goods, and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent:—**Held**, affirming the judgment of the court below, Henry, J., dissenting, that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them, than to forward them to their destination, and could not authorize the agent at Halifax to retain them. **Held**, also, that whether or not a legal title to the goods passed to McM. the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them.

McDonald v. McPherson—xii. 416.

4. Terms of contract—Carriage over several lines—Delivery of goods—Negligence—Common carriers.

See, COMMON CARRIERS.

Bill of Lading—Continued.**5. Carriers—Contract—Carriage of goods—Negligence—Bill of lading—Exception from liability under—Stowage.**

A bill of lading acknowledged the receipt on board a steamer of the defendants, in good order and condition, of goods shipped by T. (fresh meat) and contracted to deliver the same in like good order and condition . . . loss or damage resulting from sweating . . . decay, stowage, . . . or from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners or other persons in the service of the ship, or for whose acts the shipowner is liable (or otherwise howsoever) always accepted, namely (setting them out).

Held, affirming the judgment of the court below, Sir W. J. Ritchie, C.J., and Fournier, J., dissenting, that the clause "whether arising from the negligence, default or error in judgment of the master," etc., covered as well the preceding exceptions as those which followed, and was not limited in its application by the words "from any of the following perils," and the defendants were, therefore, not liable for damage to the goods shipped resulting from improper stowage, which was one of the excepted perils.

Trainor v. The Black Diamond Steamship Co.—xvi. 156.

6. Delivery of freight—Breach of duty in not delivering—Action *ex delicto* for, will not lie.

See SHIPS AND SHIPPING, 11.

Bills of Exchange and Promissory Notes—Misdirection of jury as to interest on note.

See EVIDENCE, 5.

2. Unstamped bill of exchange—42 V. c. 17, s. 13—Knowledge—Question for judge.

The action was brought by T. *et al.* against C. to recover the amount of a bill of exchange. It appeared that the draft when made and when received by T. *et al.* had no stamps; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought, and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and they immediately put on double stamps. The bill was received in evidence, leave being reserved to the defendant to move for a non-suit; the learned judge stating his opinion that though as a fact the plaintiffs knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880.

Held, 1. That the question as to whether the holder of a bill or draft has affixed double stamps upon an unstamped bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 V. c. 17, s. 13, is a question for the judge at the trial and not for the jury, (Gwynne, J., dis-

Bills of Exchange and Promissory Notes—*Continued.*

sending.) 3. That the "knowledge" referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case showed that T. acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880. 3. That the want of proper stamping in due time is not a defence which need be pleaded. (Gwynne, J., dissenting.)

Chapman v. Tufts.—viii. 543.

3. *Promissory note—Death of endorser—Notice of dishonour—* *33 V. c. 47, s. 1 (D.).*

The appellants discounted a note made by P. and endorsed by S. in the Bank of Commerce. S. died, leaving the respondent his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the note was dated, under 37 V. c. 47, s. 1 (D.). The appellants, who knew of S.'s death before maturity of the note, subsequently took up the note from the bank, and, relying upon the notice of dishonour given by the bank, sued the defendant.

Held, reversing the judgment of the Court of Appeal for Ontario, that the holders of the note sued upon when it matured, not knowing of S.'s death, and having sent him a notice in pursuance of s. 1, c. 47, 37 V., gave a good and sufficient notice to bind the defendant, and that the notice so given ensured to the benefit of the appellants.

Cosgrave v. Boyle.—vi. 165.

4. Bill of exchange for goods in bill of lading.

See BILL OF LADING, 1.

5. *Promissory note overdue in hands of payee—Garnishee clauses* *C. L. P. Act—Payment into court.*

Held, an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor under the C. L. P. Act, and payment by the garnishee of the amount to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.

Roblee v. Rankin.—23rd June, 1884.—xi. 187.

6. *Bill of exchange—Not stamped by drawer—Stamps affixed by* *drawee before being discounted—Double duty affixed at trial* *—Knowledge of law relating to stamps—42 V. c. 17—Plea* *that defendant did not make draft—Con. Stats. (N.B.) c. 37,* *s. 83, s-s. 4 & 5—Evidence of want of stamp under—* *Special plea.*

R. remitted by mail to V. a draft on Bay of Fundy Quarrying Co. Boston, Mass., in payment of an account of the company of which R. was superintendent. The draft when received by V. was unstamped, and V. affixed stamps required by the amount of the draft, and initialed them as

Bills of Exchange and Promissory Notes—*Continued.*

of the date the draft was drawn, which was at least two days prior to the date on which they were actually affixed. The draft was not paid, and an action was brought against R., who pleaded "that he did not make the draft," according to provisions of Con. Stats. (N.B.), c. 37, s. 88, s-s. 4. On the trial the draft was offered in evidence and objected to on the ground that it was not sufficiently stamped, the plaintiff having previously testified as to the manner in which the stamps were put on, and having also sworn that he knew the law relating to stamps at the time. The draft was admitted, subject to leave reserved to defendant to move for a non-suit, and at a later stage of the trial it was again offered with the double duty affixed. The trial resulted in counsel agreeing that a non-suit should be entered, with leave reserved to plaintiffs to move for verdict, court to have power to draw inferences of fact.

On motion pursuant to such leave reserved, the Supreme Court of New Brunswick set aside the non-suit, and ordered a verdict to be entered for the plaintiffs on the ground that the defect in the draft of want of stamp should have been specially pleaded. See 23 N. B. R. 843.

On appeal to the Supreme Court of Canada—**Held**, 1. Reversing the judgment of the court below, Strong and Gwynne, JJ., dissenting, that double duty should have been placed on the note as soon as it came into the hands of the drawee unstamped, and that it was too late at the trial to affix such double duty, the plaintiff having sworn that he knew the law relating to stamps, which precluded the possibility of holding that it was a mere error or mistake.

2. That under the plea that defendant did not make the draft, he was entitled to take advantage of the defect for want of stamps.

Per Strong, J.—That the note was sufficiently stamped and plaintiffs were entitled to recover.

Per Gwynne, J.—That if the note was not sufficiently stamped the defence should have been specially pleaded.

Roberts v. Vaughan.—xi. 273.

7. *Notice of dishonour by post sufficient*—37 V. c. 47, s. 1 (D.).

The Merchants' Bank of Halifax, appellants, as holders of promissory notes endorsed by McN., respondent, brought an action against him for their amount. The notes were dated at Summerside, and were payable at the agency of the Merchants' Bank of Halifax, Summerside. The defendant resided at the town of Summerside, and his place of business was there. Notices of dishonour were given to the defendant by posting such notices, addressed to the defendant at Summerside, at 1 o'clock p.m. on the day after the day on which the notes matured, the postage on such notices being duly prepaid in both cases. There is no local delivery by letter carriers from the post office in Summerside. No evidence was given by the defendant that he did not receive the notices of dishonour, nor was any evidence given by the plaintiffs that the defendant had received them. The jury found for the defendant, contrary to the charge of the learned judge. A rule *nisi* having been granted to set aside

Bills of Exchange and Promissory Notes—Continued.

this verdict, and for a new trial, the court discharged this rule *nisi* and directed the verdict to stand on the ground that the posting of the notices of dishonour to the defendant was not sufficient notice of dishonour, inasmuch as both plaintiff and defendant resided in the same town, and the notices of dishonour should have been delivered to the defendant personally, or left at his residence or place of business.

Held, reversing the judgment of the court below, that since the passing of 87 V. c. 47, s. 1, the notices given in the manner above set forth were sufficient.

Merchants' Bank of Halifax v. McNutt.—xi. 126.

8. Accommodation note—Collateral security for mortgage debt of indorser—Payment by maker—Recourse against partner and co-mortgagor of indorser.

See PARTNERSHIP, 9.

9. Bank taking forged paper in renewal of notes—Release of surety.

See BANKS AND BANKING, 15.

10. *Promissory Note—Non-negotiable—Indorsement—Liability of maker.*

H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the Hamilton Bank, who discounted it and paid over the proceeds to the company. H. knew the note was discounted, and before it fell due he had in writing acknowledged his liability on it. In an action on the note by the Hamilton Bank against H.

Held, affirming the judgment of the Court of Appeal, and that of the Divisional Court (9 O.R. 655), Strong, J., dissenting, that although, in fact, the note was not negotiable, the bank in equity was entitled to recover, it being shown that the note was intended by the makers to have been made negotiable, and was issued by them as such, but, by mistake or inadvertence, it was not expressed to be payable to the order of the payees.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

Harvey v. The Bank of Hamilton.—June 14, 1888.—xvi. 714.

11. *Promissory note—Identity of payee—Double stamping.*

A promissory note made payable to John Souther & Son was sued on by John Souther & Co.

Held, that it being clear by the evidence that the plaintiffs were the persons designated as payees, they could recover.

Bills of Exchange and Promissory Notes—Continued.

It is no objection to the validity of a promissory note that it is for payment of a certain sum in currency. Currency must be held to mean "United States Currency," when the note is payable in the United States.

If a note is insufficiently stamped, the double duty may be affixed as soon as the defect comes to the actual knowledge of the holder. The statute does not intend that implied knowledge should govern it.

The appellant claimed that he was only a surety for his co-defendant, and that he was discharged by time being given to the principal to pay the note.

Held, that the fact of time being so given being negatived by the evidence, it was immaterial whether appellant was principal or surety.

The judgment of the Supreme Court of Nova Scotia (20 N. S. Rep. 509) affirmed.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Wallace v. Souther.—March 18, 1889.—xvi. 717.

12. Partnership—Partner in two firms—Use of name of one for the benefit of the other—Authority—Notice.

See PARTNERSHIP, 16.

13. *Promissory note—Illegal consideration—Election law—38 V. c. 7, s. 266 (Q.)—R. S. Q. Art. 425.*

S. (appellant's husband) brought an action against St. L. Bros. on a promissory note for \$4,000, a renewal of a note for the same amount made by S., endorsed by him and handed to St. L. Bros., alleging that the original note had been made and discounted for the accommodation of St. L. The evidence showed that the proceeds of the note were paid over to one D., as agent for S., to be used as a portion of a provincial election fund controlled by S.

Held, affirming the judgment of the court below, that the plaintiff could not recover, even assuming a promise to pay on the part of St. L. Bros., the transaction being illegal under 38 V. c. 7, s. 266 (P.Q.), now R. S. (Q.), Art. 425, which makes void any contract, promise or undertaking, in any way relating to an election under the said Act.

Dansereau v. St. Louis.—xviii. 587.

14. Forgery of bill—Cannot be ratified nor can bank recover.

See FORGERY, 8.

15. Improper admission of evidence—Belief as to signature on note—Conversation partly given on examination in chief—Order for new trial reversed.

See EVIDENCE, 50.

16. Promissory Note—Consideration, failure of—Transaction.

See TRANSACTION, 2.

Bills of Exchange and Promissory Notes—Continued.

17. Agent of bank dealing with funds contrary to instructions by discounting drafts and using proceeds in business of his firm—Assignment by firm in trust for creditors—Liability to bank—Drafts "debts due and owing" by firm to bank.

See BANKS AND BANKING, 24.

18. Agreement to endorse notes—Failure to discount notes—Right to commission—Consideration.

See CONTRACT, 46.

19. Assignment for benefit of creditors—Claim against assignor—Notes held as collateral security—Collocation—Joint and several liability.

See ASSIGNMENT, 23.

20. *Promissory note—Failure of consideration—New trial.*

Action on a promissory note. Defence, that the note was given in payment of a machine for polishing wood, which machine did not do the work it was represented to do. The evidence at the trial showed that the machine had been used for some time in connection with building cars, and evidence for defendant went to prove that the work was under the control of a contractor with defendant; that before the machine could be used a fan had to be attached to keep off the dust; that it spoiled the boards on which it was used; and that the contractor did not inform the defendant as to the defects and he knew nothing of them until the case came on for trial. It appeared, however, that the general superintendent of defendant's business watched the progress of the work in which the machine was used and inspected all the cars before they were delivered. The jury found a verdict for the plaintiffs and a new trial was refused, the Supreme Court of New Brunswick holding that the defendant must be held to be affected with the contractor's knowledge or, at all events, that the superintendent was in a position to know if the machine did not work properly.

Held, that the new trial was properly refused.

Eason v. McGregor.—xx. 176.

21. *Promissory note—Accommodation—Made by partner without authority—Renewal—Knowledge of holder.*

In an action on a promissory note the defence was that the note of which it was a renewal was given for the accommodation of the payee by the defendant's partner who had no authority to make it, and that the plaintiffs when they took the renewal knew of its defective character.

Held, that as it did not appear that such knowledge attached when the original note came into plaintiff's possession they were entitled to recover.

Present: Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.
Union Bank of Lower Canada v. Bulmer.—23 C. L. J. 390.—22nd June, 1887.

Bills of Exchange and Promissory Notes—Continued.**22. Bank cheques—Acceptance by cashier and president at a future date—Liability of bank.**

See BANKS AND BANKING, 32.

23. Partnership, style of—Name of individual member—Note made in firm name—Dissolution—Liability of firm.

Action on a promissory note for \$1,260.40. The defendant J. E. Dunham carried on business in the city of Montreal as a dealer and importer in dye stuffs and chemicals under the name of J. E. Dunham & Co. In this company the defendant Park had no interest, and was in no way connected with it. While carrying on this business at Montreal the defendant Dunham entered into partnership with Park, on the 1st of May, 1886, for the purpose of carrying on the same business at Toronto under the name of J. E. Dunham & Co. It was agreed that this latter partnership should be dissolved upon the 1st of August following, if notice given, and such notice was actually given, the Toronto business being, however, still continued, as was proved, for the purpose of winding it up. On the 12th August, while both these firms were thus carrying on business separately at Montreal and Toronto respectively, one Isaacs by means of fraud procured Dunham to make the promissory note sued on, ante-dating it of the 29th July previous. This was afterwards endorsed over to one Gardner, and by Gardner to the plaintiff.

Upon the evidence it was held by Rose, J., before whom the action was tried, that the note was given by Dunham with reference to the business carried on at Montreal, and came within the principle of *Standard v. Dunham*, 14 Ont. R. 67, which was an action brought on another note, given under the same circumstances and at the same time as the one sued on in the present case.

On appeal to the Court of Appeal for Ontario this judgment was affirmed, and on further appeal to the Supreme Court of Canada, it was **Held**, that the appeal should be dismissed with costs.

Present: Strong, Fournier, Taschereau and Gwynne, JJ.

Danks v. Dunham.—14th June, 1889.

24. Assignment of notes under agreement to collect and divide proceeds—Proving under administration order—Champerty—Subsequent proof by original holder—Statute of Limitations—Practice.

See CHAMPERTY.

25. Promissory note—Liability on—Maker or indorser—Intention—Evidence.

W., having agreed to become security for a debt, wrote his name across the back of a promissory note drawn in favour of the creditors and signed by the debtor. The note was not endorsed by the payees, and no notice of dishonour was given to W. when it matured and was not paid. An action was brought against W. as maker of the note jointly with the debtor, on the trial

Bills of Exchange and Promissory Notes—Continued.

of which a non-suit was entered with leave reserved to the plaintiffs to move for a judgment in their favour, if there was any evidence to go to the jury as to W.'s liability.

Held, affirming the judgment of the Supreme Court of New Brunswick, that there was no evidence to go to the jury that W. intended to be liable as a maker of the note, and plaintiffs were rightly non-suited.

Present:—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

The Ayr American Plough Co. v. Wallace.—xxi. 256.

26. Mechanics' lien—Materials supplied to contractor—Payment by promissory note—Suspension of lien.

See MECHANICS' LIEN, 2.

27. Promissory note—Form of—"Sixty days after date we promise to pay," and signed by manager of company—liability of company on.

R., manager of an unincorporated lumbering company, gave a promissory note for logs purchased by him as such manager, commencing, "Sixty days after date we promise to pay," etc., and signed it "R., manager O. L. Co." An action on this note against the individual members of the company was defended on the ground that it was the personal note of R.; that the words "manager," etc., were merely descriptive of R.'s occupation, and that the defendants were not liable.

Held, affirming the judgment of the Supreme Court of the North-west Territories, 1 N. W. T. Rep., part 3, p. 41, that as the evidence showed that when the note was given, both R. and the creditor intended it to be the note of the company, and as R., as manager, was competent to make a note on which the members of the company would be liable, and as the form of the note was sufficient for that purpose, the defence set up could not prevail, and the plaintiffs in the action were entitled to recover.

Fairchild v. Ferguson.—xxi. 484.

Bills of Sale.

See CHATTEL MORTGAGE.

Bond—Goods in.

See STOPPAGE IN TRANSITU.

2. Action on.

See MORTGAGE, 10.

3. Alleged misrepresentation by co-obligor as to effect and purpose of.

See AGREEMENT, 11.

Bond—Continued.**4. Action on bail bond—Alteration of after execution—Proof of—Form of bond.**

In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute.

Held, affirming the judgment of the Supreme Court of Nova Scotia (19 N. S. Rep. 96) that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed.

Held also, that the objection as to the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this court.

Woodworth v. Dickie—Oct. 26th, 1886—xiv. 734.

5. Onus probandi—Action on bond—Execution of bond—Seal.

In an action on a bond against the sureties of the defaulting clerk of the Municipality of Shelburne, the defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it.

Held, affirming the judgment of the Supreme Court of Nova Scotia (19 N. S. Rep. 171), Henry, J., *dubitante*, that the plaintiffs had proved a *prima facie* case of a bond properly executed on its face, and as the defendant had not negatived the due execution of the bond, it being quite consistent with his evidence that it was duly executed, the *onus* of proving want of execution was not thrown off the defendant, and as neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendant, plaintiffs were entitled to recover.

Marshall v. Municipality of Shelburne—Feb. 15th, 1887—xiv. 737.

6. Execution of bond by government official for faithful discharge of his duties—Evidence of execution—Estoppel.

See EVIDENCE, 35.

7. Bond—Objection to—When to be taken.

Bond as security for costs of appeal to Supreme Court should provide for prosecution of the appeal. But objection must be taken on application in chambers to dismiss, or will be considered waived.

Whitman v. Union Bank—xvi. 410.

8. Surety—Execution of bond by—Consideration—Embezzlement by principal—Stifling prosecution for.

See CONTRACT, 57.

9. Railway Co.—Bonus to—Condition in bond for repayment in event of Co. ceasing to be independent—Breach.

The county of H., in 1874, gave to the H. & N. W. Ry. Co. a bonus of \$65,000 to be used in the construction of their railway, and the company

Bond--Continued.

executed a bond, one of the conditions of which was that the bonus should be repaid "in the event of the company, during the period of twenty-one years, ceasing to be an independent company." In 1888 the H. & N. W. Ry. Co. became merged in the G. T. R. and, as was held on the facts proved by the trial judge and the Divisional Court, ceased to be an independent line.

Held, affirming the decision of the Court of Appeal for Ontario (19 Ont. App. R. 252), that there had been a breach of the above condition and the county was entitled to recover from the G. T. R. the whole amount of the bonus as unliquidated damages under said bond.

Appeal dismissed with costs.

Present:—Strong, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

The Grand Trunk Ry. Co. v. County of Halton.—Feb'y. 20, 1893.

Bonds—Collateral security—Revendication.

B., as trustee for H. C. & Co., deposited with D. twelve bonds of the M. C. & S. Ry. Co., as collateral security, to be availed of only subsequent to the failure of the government to pay \$10,000 subsidy previously transferred to D., and obtained a receipt from D. that on the subsidy being paid D. would return these bonds to B. The subsidy was paid and B. sued D. to recover back the twelve bonds. H. C. & Co. did not intervene.

Held, that B., being a party personally liable on the bills held by D., which the government subsidy of \$10,000 transferred was intended to pay, and having complied with all the conditions mentioned in the receipt entitling him to recover possession of the bonds, was, as against D., the legal owner of the bonds.

Drummond v. Baylis.—ii. 61.

2. Validity of

See RAILWAYS AND RAILWAY COMPANIES, 9.

3. Of Railway Company—Agreement to deliver in payment of construction.

See RAILWAYS AND RAILWAY COMPANIES, 19.

Boundary—Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries.

T. was the owner of lot 9, and C. was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T., being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed his northern boundary was. C. pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and

Boundary—Continued.

produced it till it met the post. He staked out his line, C. not objecting. A few days afterwards T., with his architect and builder, went on the ground, and, in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof and considerable money had been expended in building.

Held, that C. was estopped from disputing, that the line run by the surveyor was the true line.

Per Strong, J.—When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description.

In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents, which do not agree with those in the deed.

Where there is a direct conflict of testimony the finding of the judge at the trial must be regarded as decisive and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanor while under examination.

Grasett v. Carter.—x. 105.

2. *Boundaries—Agreement as to—Whether executed or executory—plan, signed by adjoining proprietors—Statute of Frauds—Purchaser for value without notice—Discretionary jurisdiction of Court of Equity.*

The plaintiff, by his bill, alleged that in March, 1844, the Crown granted in fee to William Stewart the east part and the south-west part of lot letter F., and that he went into and remained in possession thereof until his death; that one Kealey was then in possession of the part of lot letter G., immediately adjacent on the south to the land granted to Stewart; that disputes having arisen respecting the true boundary, it was agreed to have it surveyed and defined on the ground by Anthony Swalwell, P.L.S., whose survey was to be the settled and permanent boundary, and who accordingly in September, 1854, made a survey, and prepared a map and plan showing the boundary line; that thereupon, on or about the 20th October, 1854, the said boundary line having been so defined, it was mutually agreed to between the said William Stewart and the said Martin Kealey, and the following memorandum was then written upon the said map or plan, and was signed by them respectively: "We, the undersigned, interested in this survey, agree to it as shown by this plan, as witness our hands;" that thereupon the said parties shifted their occupation, so as to accord with the said line so surveyed by the said Swalwell and so agreed to as aforesaid, and that Kealey afterwards applied

Boundary—Continued.

for the patent of lot G., which was issued to one Horace Pinhey as trustee for him. The bill went on to state that the survey commenced from the west side of G. at a point then mutually agreed upon between Stewart and Kealey and the other persons interested, as the north-west angle of the lot; that Stewart and Kealey then removed to and thence continued in possession of their respective lands as aforesaid, as so separated and defined; that Stewart died in 1856; that the plaintiff, to whom he devised lot F., did not attain his majority until 1870; that in 1862, the defendant obtained possession of a strip of the land in possession of the plaintiff and his father under the agreement, being about 70 feet in width, to the north of the boundary, which had been agreed upon, and refused to restore possession, or to recognize the agreement; that the plaintiff was unable to recover possession at law, inasmuch as the legal title of the plaintiff under the patent would be determined by the mode of survey which prevailed according to the general law; that the defendant had notice of the agreement and the settlement of the boundary; that the true boundary line was difficult to ascertain in 1854, and that the agreement was a compromise and settlement of disputed and doubtful rights. The prayer was that the agreement might be specifically enforced, and the boundary established accordingly, and that the defendant might execute a deed to confirm the strip of land to the plaintiff, and might be ordered to deliver up possession.

The defendant denied that Stewart ever had actual possession of the disputed strip, which he alleged was in a state of nature at the time of his purchase from Kealey; he alleged that he had had the line run by one Sparks, a P. L. S., and had erected an expensive fence along the line and a dwelling house, the whole or greater part of which was on the land claimed by plaintiff; that he had made other valuable improvements; that Kealey was an illiterate man, and if his name was procured to the agreement it was through fraud. He also set up the registry laws, the statute of frauds, laches, that he was a *bona fide* purchaser for value without notice, and that the agreement was not one which the court in its discretion would enforce against him.

Spragge, C., made a decree in accordance with the plaintiff's contentions. The judgment of the chancellor is not reported except on a point which arose with reference to the proof of the will of plaintiff's father: 24 Grant 433.

The Court of Appeal reversed the decree, the judgment of the court being delivered by Moss, C.J. He was of opinion, from a review of the whole tenor and scope of the pleading, that the plaintiff was appealing to the discretionary jurisdiction of the court, and that the ordinary principles upon which it was administered were applicable. That he had seen no case in which a mere verbal agreement, unattended by acts, had been sufficient under the statute of frauds, although it had been held in a number of cases in the courts of the U. S. that where two adjoining proprietors employ a surveyor to define their boundary line, and possession is taken and held in accordance therewith, the objection of the want of a writing shall not be allowed to prevail. That the plaintiff had failed to show anything done on the faith of the agreement, or a change of position in reliance upon the boundary line settled. That the proof of the agreement was not of that clear and unambiguous kind the court

Boundary—Continued.

requires when asked to exercise its discretionary jurisdiction. That there was no sufficient evidence to countervail the defendant's oath denying that he had actual notice of the alleged agreement, and that it was a case in which specific performance would inflict a grievous hardship upon the defendant without any benefit to the plaintiff which he had a right to expect, and without the plaintiff having any equity which the court was bound to respect.

On appeal to the Supreme Court of Canada, **Held**, that the plaintiff had failed to establish the agreement alleged in his bill, of which he sought specific performance, and upon which he rested his application for the interference in his favour of the equitable jurisdiction which he evoked. That if the plaintiff contended that the evidence established that William Stewart and Kealey agreed upon and adopted as the boundary line between them the line which Swalwell had surveyed, and that for this purpose and to give effect to this agreement they signed the map, and that in pursuance of such agreement and in adoption of this line as the boundary line between them they moved their fences to conform to the agreement and occupied up to such fences until after the death of Stewart when the defendant entered upon the possession then held by the devisee, then, the case assuming the completion of the agreement and presenting a purely legal claim, and the bill having been filed before the Administration of Justice Act, the Court of Chancery would have no jurisdiction.

Appeal dismissed with costs.

Stewart v. Lees.—10th April, 1880.

3. *Title to land—Old grant—Starting point to define metes and bounds—How ascertained.*

In an action of ejectment the question to be decided was, whether the *locus* was situate within the plaintiff's lot No. 5, in concession 18, or within defendant's lot adjoining No. 24, in concession 17.

The grant through which the plaintiff's title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost, and this starting point could not be ascertained.

Held, affirming the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 788), Strong and Taschereau, JJ., dissenting, that such southern boundary could not be ascertained by measuring back exactly 84 chains from the river.

Plumb v. Steinhoff.—June 20, 1887—xiv. 739.

4. *Trespass—Title to land—Boundaries—Easement—Agreement at trial—Estoppel.*

In an action for damages by trespass by McI. on M.'s land, and by closing ancient lights, defendant claimed title in himself and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff's in title. On the trial the parties agreed to strike out the pleadings in reference to lights and drains and to try the question of boundary only.

Boundary—Continued.

Held, affirming the judgment of the Supreme Court of Nova Scotia, (19 N. S. Rep. 419), Ritchie, C.J., and Gwynne, J., dissenting, that independently of the conventional boundary claimed by the defendant the weight of evidence was in favour of establishing a title to the land in question in the defendant and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over 20 years. *Seemle*, that if it was open to him such user was not proved.

Mooney v. McIntosh.—June 20, 1887—xiv. 740.

5. *Disputes as to—Reference to surveyors—Duties of surveyors under.*

R., who held a license from the government of New Brunswick to cut timber on certain crown lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and he issued a writ of replevin for some 800 logs alleged to be so cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under the said license (of R.) should be surveyed and established by (naming the surveyors) and the stumps counted, etc.

Held, reversing the judgment of the Supreme Court of New Brunswick, (26 N. B. Rep. 258), that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line.

Snowball v. Ritchie.—Feb. 28, 1888—xiv. 741.

6. Mining lands—*Bornage*—Injunction—Appeal—Jurisdiction—
R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 103.

Bribery.

See ELECTION.

JURISDICTION, 64.

Bridge—Liability of municipal corporation for defect in.

See CORPORATIONS, 19.

2. Powers of bridge company—Impeding navigation.

See NAVIGATION, 3.

3. Toll bridge—38 V. c. 97—Interference—Damages.

See FERRY, 5.

4. Ont. Municipal Act, sections 535 (2), 538—Bridges over rivers crossing boundary lines—Deviation of boundary road—
Liability of counties to repair bridges—42 V. c. 4 (O.)—

Bridge—Continued.

Effect of as to the townships of Verulam and Harvey—
Territorial Act, R. S. O. c. 5—Township fronting on lake.

See MUNICIPAL CORPORATION, 24.

5. Toll-bridge—Franchise of—Interference by building free bridge
—Injunction—44-45 V. c. 90, (P.Q.)

See TOLLS, 3.

British Columbia—Order in Council admitting into confederation,
section 11—47 V. c. 4, s. 2 (B.C.)—Provincial public lands,
transfer of, to Dominion—Precious metals, claim to.

See MINES AND MINERALS, 2.

2. Order in Council admitting into confederation, section 11—47 V.
c. 14 (B.C.)—Land transferred to Dominion by Province
for building C. P. Ry.—Subsequent grant by Province of
part of.

See PUBLIC LANDS, 2.

3. Land ordinance, 1865—Grant of water—Riparian owners—
Rights to exclusive use of stream—Unoccupied water.

See RIPARIAN PROPRIETORS, 5.

British North America Act, 1867.

1. Sections 91 & 92—Licenses—Brewers. ii. 71.

See LEGISLATURE, 2.

2. Sections 18, 41, 91, 92, sub-sections 13 & 14, sections 101, 129,
Dominion Controverted Elections. iii. 1.

See ELECTION, 4.

LEGISLATURE, 1.

3. Section 91, sub-section 27—38 V. c. 47—Power of police and
stipendiary magistrates to try in a summary manner
felonies and misdemeanors.

See HABEAS CORPUS, 2.

15TH Nov., '79.

4. Section 91, sub-section 2, section 92—Canada Temperance Act,
1878—Power to prohibit sale of intoxicating liquors.

iii. 505.

See PARLIAMENT OF CANADA, 5.

British North America Act, 1867—Continued.

5. Sections 9, 17, 56, 58, 59, 91, 92, sub-section 1—Power of appointing Queen's Counsel. iii. 575.
See LEGISLATURE, 4.
6. Sections 91 & 92—Insurance. iv. 215.
See LEGISLATURE, 5.
7. Sections 91 & 101—Maritime Court of Ontario. iv. 648.
See MARITIME COURT OF ONTARIO, 1.
8. Section 91, sub-section 12—31 V. c. 60—14 & 15 V. c. 63 (Imp.),
 —Fishery officer, action against. v. 66.
See PARLIAMENT OF CANADA, 4.
9. Sections 91 & 92—Licenses, merchants, traders, etc. v. 356.
See LICENSE, 1.
10. Sections 91, 92, 102 & 109—Escheat. v. 538.
See LEGISLATURE, 6.
11. Section 91, sub-section 12—Fisheries, regulation and protection
 of—Rights of riparian proprietors. vi. 52.
See PETITION OF RIGHT, 4.
12. Section 108—Public harbour—Grant of foreshore by patent
 under great seal of province. vi. 707.
See HARBOUR.
also ESTOPPEL, 19. xxi. 152.
13. Sections 65, 126 & 127, section 91, sub-section 3, section 92,
 sub-section 2—Taxation—Filings in court. viii. 408.
See LEGISLATURE, 7.
14. Section 91, sub-section 15—34 V. c. 5 (D.) (Banking Act),
 sections 46, 47 & 48—Warehouse receipts. viii. 512.
See WAREHOUSE RECEIPTS, 2.
15. Section 92, sub-section 14—Power of provincial legislature to
 legislate respecting procedure and residence of judges. 18th June, 1883.
See LEGISLATURE, 12.
16. Section 92—Sale of liquors—Police regulations—42 & 43 V.
 c. 4, s. 1 (Q.). ix. 185.
See LEGISLATURE, 10.

British North America Act, 1867—Continued.

17. Section 91, sub-section 12, section 92, sub-section 13—31 V. c. 60, sections 2, 19 (D.)—O. C. 11th June, 1879, construction of—Fishery officers, action against. ix. 206.
See FISHERIES, 3.
18. Section 91—Obstruction in tidal and navigable rivers. x. 222.
See LEGISLATURE, 8.
19. Sections 91 & 92 sub-section 9, 129—Sale of Liquors—Licenses—41 V. c. 3 (Q.). xi. 25.
See LEGISLATURE, 13.
20. Sections 91, 92—Liquor License Act, 1883, and amending Act. 12th Jan., 1885.
See LIQUOR LICENSE ACT, 1883.
21. Section 91, sub-section 24, section 92, sub-section 5, sections 109, 117—Indian lands. xiii. 577.
See INDIAN LANDS.
also ASSESSMENT AND TAXES, 8.
22. Section 92, sub-section 5, sections 109 & 146—Public Lands—Transfer to Dominion—Precious metals. xiv. 345.
See MINES AND MINERALS, 2.
23. Section 92, sub-sections 9, 15—Quebec License Act, 41 V. c. 3, and amendments—43 V. c. 19 (D.)—Licensed brewers. xv. 253.
See LEGISLATURE, 14.
24. Section 91, sub-sections 10, 13, section 92, sub-section 16—Taxation of ferry boats. xv. 566.
See LEGISLATURE, 15.
25. Section 92, sub-sections 10—51 V. c. 5 (Man.)—Railway Act, 1888, (D.), sections 306 & 307—R. S. C. c. 109, s. 121. 22nd Dec., '88.
See LEGISLATURE, 24.
26. Sections 91, 92, sub-section 14, sections 101, 129—Conferring jurisdiction on the Court of Vice-Admiralty. xvi. 707.
See PARLIAMENT OF CANADA, 2.

British North America Act, 1867—Continued.

27. Section 91, sub-section 2, section 92—New Brunswick Liquor License Act, 1888. xvii. 44.

See LEGISLATURE, 16.

28. Section 101—Ontario Judicature Act, 1881, sec. 43.

See JURISDICTION, 25.

LEGISLATURE, 17.

xvii. 251.

29. Section 92, sub-section 9—License for sale of meat, etc.—
“Other licenses.” xvii. 495.

See LEGISLATURE, 18.

30. Section 91, sub-section 21—The Winding-up Act, R. S. C. c. 129,
s. 3. xviii. 667.

See PARLIAMENT OF CANADA, 11.

31. Section 91, sub-section 19, and section 92, sub-section 2—
Interest—Discount on early payment and penalty on late
payment of taxes—Municipal Act, Manitoba. xix. 204.

See LEGISLATURE, 20.

32. Section 93, sub-section 1—53 V. c. 38 (Man.)—Denominational
schools. xix. 374.

See LEGISLATURE, 21.

33. Section 91, sub-sections 15 & 21—Banking and Incorporation
of banks—Bankruptcy and insolvency. xix. 510.

See PARLIAMENT OF CANADA, 12.

34. Section 125—Charter of the C. P. R. Co.—Lands of the company
exempt from taxation until sold or occupied. xix. 702.

See ASSESSMENT AND TAXES, 23.

35. Section 92, sub-section 14—Administration of Justice.

13th Dec., 1892—xxi.

See LEGISLATURE, 23.

- Broker**—Speculating in stocks—Instructions to broker—Broker's
duty—Money paid for margins.

See AGENT, 16.

Builder's Privilege—Arts. 1695, 2013, 2103 C. C.—Expert—Duties of—Procès verbal—Art. 333, et seq., C. C. P.

Held, 1. That it is not necessary for an expert, when appointed under Art. 2013 C. C., to secure a builder's privilege on an immovable, to give notices of his proceedings to the proprietor's creditors, such proceedings not being regulated by Art. 333, et seq., C. C. P.

2. That there was evidence to support the finding of fact of the courts below that the second *procès verbal* or official statement required to be made by the expert under Art. 2013 has been made within six months of the completion of the builder's works.

3. That it was sufficient for the expert to state in his second *procès verbal*, made within the six months, that the works described had been executed, and that such works had given to the immovable the additional value fixed by him. The words completed "*suivant les règles de l'art*" are not *strictissimi juris*.

4. That if an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation.

Appeal from the Court of Queen's Bench for L. C., dismissed with costs.

Dufresne v. Prefontaine. }
Vallee v. Prefontaine. } xxi.

Building Society.

See CORPORATIONS, 17.

BY-LAW, 18.

INSOLVENCY, 27.

By-Law—Imposing license tax on merchants, traders, etc.

See LICENSE, 1.

2. Of city of St. John—Building erected in violation of.

See CONTRACT 4, 20.

3. Municipal, validity of—Grant of bonus to railway company by—Remedy—Action at law—Mandamus—34 V. c. 48 (O.). construction of.

By 18 V. c. 33, the Grand Junction Railway Co. was amalgamated with the Grand Trunk Railway Co. of Canada. The former railway not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railway Co., but gave it a slightly different name, and made some changes in the charter. After this, in 1870, a by-law to aid the company by \$75,000 was introduced into the county council of Peterborough. This by-law was read twice only, and, although in the by-law it was set out and declared that the ratepayers should vote on said proposed by-law on the 16th November, it was on the 23rd November that the ratepayers voted on a by-law to grant a

By-law—Continued.

bonus to the appellant company, construction of the road to be commenced before the 1st May, 1872. At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act 84 V. c. 48 (O.) was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day of the same year, chapter 80 was passed, giving power to municipalities to aid railways by granting bonuses. In 1874 the 87 V. c. 48 (O.) was passed, amending and consolidating the Acts relating to the company. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 84 V. c. 48 (O.). In 1872 the council served formal notice on the company, repudiating all liability under the alleged by-law. Work had been commenced in 1872, and time for completion was extended by 89 V. c. 71 (O.). No sum for interest or sinking fund had been collected by the corporation of the county of Peterborough, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees.

Held, affirming the decision of the court below, that the effect of the statute 84 V. c. 48 (O.), apart from any effect it might have of recognizing the existence of the railway company, was not to legalize the by-law in favor of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, there being certain other defects in the said by-law not cured by the said statute, the appellants could not recover the bonus from the defendants.

Per Gwynne, J., Fournier and Taschereau, JJ., concurring: As the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in Ontario in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of *mandamus* which the writ of the *mandamus* obtainable on motion without action still is.

Per Henry, J.: That if appellants had made out a right to file a bill to enforce the performance of a contract ratified by the legislature, they would not have the right to ask for the present writ of *mandamus*.

The Grand Junction Railway Co. v. The Corporation of Peterborough.

—viii. 76.

4. Municipal—Guaranteeing cost of expropriation—Invalid.

See RAILWAYS AND RAILWAY COMPANIES, 18.

5. Of Synod, altering disposition of commutation fund.

See COMMUTATION FUND.

By-Law—Continued.

6. Of city of Quebec—Imposing license fee on transient traders.
See LICENSE, 6.
7. Of municipality—Bonus to railway—Premature consideration of—Error in copy submitted to ratepayers—Signing and sealing—To be confirmed by same council as that to which it was first submitted.
See MUNICIPAL CORPORATION, 7.
8. Of corporation of city as to construction of street railway—Agreement—Notice before assuming ownership by corporation—Arbitration.
See CORPORATIONS, 39.
9. Of municipal corporation—Voting by ratepayers on—Casting vote by returning officer—R. S. O. 1887, c. 174, s. 152.
See CORPORATIONS, 40.
10. Of city of Montreal taxing ferries—*Ultra vires* as going beyond provisions of statute, 39 V. c. 52 (P.Q.).
See LEGISLATURE, 15.
11. Bonus to railway—Performance of conditions—Specific performance.
See RAILWAYS AND RAILWAY COMPANIES, 42.
12. By-law respecting sale of meat in private stalls—Validity of—37 V. c. 51, s. 123, s-s. 27 & 31 (P.Q.)—Power of Provincial Legislature to pass—B. N. A. Act, 1867, s-s. 9 of s. 92—“Other licenses.”
See LEGISLATURE, 18.
13. Of municipality—Liquor dealer—Tax on—47 V. c. 84 (Q.)—Constitutionality of.
See JURISDICTION, 76.
14. Proceedings to quash—Judgment in—Subsequent repeal—Appeal—Costs.
See JURISDICTION, 85.
15. Action to set aside—Appeal from decision in—Supreme and Exchequer Courts Act, ss. 24 (g) & 29.
See JURISDICTION, 86.

By-Law—Continued.

16. Of municipality—Exercise of powers by—Contract—Enforcement of.

See MUNICIPAL CORPORATION, 17.
CONTRACT, 51.

17. Of municipality—Local tax—Validity—Appeal—Rule or order to quash—R. S. C. c. 135, s. 24 (g).

See JURISDICTION, 93.

18. *Building society—Transfer of shares—Indebtedness of transferrer—Right of society to hold shares.*

A by-law of a building society (appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for the amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of \$3,744, for which amount, under the by-law, his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society claimed the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side) and restoring the judgment of the Superior Court, that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society. Fournier and Taschereau, JJ., dissenting.

La Societe Canadienne Francaise de Construction de Montreal v. Daveluy.

—xx. 449.

19. Of municipal corporation—Authority to raise money for improvement of streets—Right to do work under.

See MUNICIPAL CORPORATION, 21.

20. Increasing capital stock of company—Not in conformity with charter—Action for calls.

See CORPORATIONS, 47.

By-Law—Continued.

21. Of municipality—Voting on—Casting vote of returning officer
R. S. O. 1887, c. 174, ss. 152 & 299.

See MUNICIPAL CORPORATION, 23.

22. Of municipality for repair of road—Action to recover amount
imposed — Appeal—Jurisdiction — “Rights in future”—
Supreme and Exchequer Courts Act, R. S. C. c. 135, s. 29.

See JURISDICTION, 98.

23. Municipal corporation—Executory contract for purchase of fire
engine—Necessity for by-law.

See MUNICIPAL CORPORATION, 28.

24. Submission of, to ratepayers—Publication of, in adjoining
municipality—What, a sufficient compliance with statute,
Ontario Municipal Act, R. S. O. c. 184, s. 293.

See MUNICIPAL CORPORATION, 29.

C.

Calls—Action for.

See CORPORATIONS, 9, 31.

- Canada**—Culling timber under license from old province of—Dis-
pute with New Brunswick—Order in council of Dominion
Government—Petition of right by licensee.

See PETITION OF RIGHT, 20.

Canada Temperance Act, 1878—Constitutionality of.

See PARLIAMENT OF CANADA, 5.

2. Conviction by J. P.—For selling contrary to provisions of—
Removal by *certiorari* into Q. B. Man.—No appeal.

See JURISDICTION, 33.

3. *Case referred by Governor in Council—Notice required by
section 6—Deposit of, in office of Registrar.*

Section 6 of the Canada Temperance Act, 1878, provides that the notice
required by section 5, to be sent to the Secretary of State of the desire of the
signers that the votes of the electors be taken for or against the adoption of

Canada Temperance Act, 1878—*Continued.*

the petition must be deposited in the office of the sheriff or registrar of deeds of or in the county for public examination, and evidence of such deposit sent to the Secretary of State, with notice prescribed in section 5. In the case of the county of Perth, the notice was deposited with the registrar of the north riding only. Thereupon a petition was sent to the government praying that under these circumstances no proclamation under section 7 should be issued by the Governor General in Council. The Governor General in Council thereupon referred the following case to the Supreme Court:—

There are two registrars of deeds for the county of Perth, in the province of Ontario—one for the north riding, with an office at Stratford, and one for the south riding, with an office at St. Mary's. With a notice and petition for bringing the second part of the Canada Temperance Act, 1878, into force in the said county, there was laid before the Secretary of State evidence that such notice and petition was deposited, for the purpose and time required, in the office of the registrar of deeds for the north riding of the said county.

Is that a compliance, in that respect, with the requirements of the sixth section of the said Act?

Ritchie, C.J., in giving judgment said, that in such an important matter, involving the right of a certain class of persons, it was important that every provision of the law should be strictly complied with. This, he held, had not been done. The petition might have been deposited either in the sheriff's office or in both the registry offices. He held that the filing in the one registry office was insufficient.

Strong, J., said there could be only one construction of the Act, and no argument could be advanced to sustain the validity of the filing. He was only surprised that it had been found necessary to resort to this court to obtain a decision upon such a question.

The other judges concurred.

In re Canada Temperance Act, 1878, and County Perth.—20 C. L. J. 375.

—28th Oct., 1884.

4. *Case referred by Governor General in Council—Petition for bringing second part of Act into force—Signatories—Withdrawal of names by.*

A certain number of electors of the county of Kent, in the province of Ontario, having signed a notice and petition under the provisions of the Canada Temperance Act, 1878, bringing into force in the said county of the second part of the said Act, and the said notice and petition having been laid before the Secretary of State with evidence of compliance by the petitioners with the formalities prescribed by the Act, but before being submitted to the Governor General in council in the view to the issuing of a proclamation under the 7th section of the Act, some of the signatories have laid before the Secretary of State, a petition asking to withdraw their names from the said petition. Have they a right to so withdraw their names?

Opinion—The said signatories to the said petition, signed under the provisions of the said Act for bringing into force in the said county the second

Canada Temperance Act, 1878—Continued.

part of the said Act, have not, under the circumstances set forth in the said question, the right to withdraw their acknowledged and deliberate signatures, or to have the same withdrawn from the said petition.

In re Canada Temperance Act, 1878, and the County of Kent.

—12th Nov., 1884.

5. *Canada Temperance Act, s. 107—Appropriation of penalties for contravention of, 31 V. c. 1, s. 7, s-s. 22—Interpretation Act—Applicable to statutes relating to P. E. I.*

Held, 31 V. c. 1, s. 7, s-s. 22, Interpretation Act, does not apply to penalties imposed under the Canada Temperance Act. The second part of such sub-section refers only to appropriation of penalties imposed under the provisions of the first part, relating to the mode of recovering penalties where no such mode is given in the Act contravened, and as section 107 of the Canada Temperance Act provides for the prosecution of offences in the manner directed by the Act relating to the duties of justices of the peace out of session, and for such purposes incorporates the necessary parts of the latter Act in itself, thus providing a mode for the recovery of penalties under the Canada Temperance Act, the sub-section 22 aforesaid has no application.

The penalties imposed by virtue of the provisions of the Canada Temperance Act should therefore go to the Crown, as in cases under the said Act relating to the duties of justices of the peace out of session, which makes no specific appropriation of penalties imposed under it. (Ritchie, C.J., *dubitante*.)

The Interpretation Act, 31 V. c. 1, applies to statutes of the Dominion relating to Prince Edward Island, whether such statutes were passed before or after the admission of the island into the Dominion.

Appeal allowed with costs.

Fitzgerald v. McKinlay.—22nd June, 1885.

6 *Justices of the peace—Conviction—Canada Temperance Act, 1878, section 105—Absence—Wrongful arrest—Justification.*

A. and B., justices of the peace for King's county, were sued for issuing a warrant of commitment under which B. (appellant) was imprisoned.

The facts, as proved at the trial, were as follows: A prosecution under the Canada Temperance Act, 1878, was commenced by two justices, A. and B., and a summons issued. On the return of the summons, on the application of the defendant, A. and B., were served with a subpoena, to give evidence for the defendant on the hearing; whereupon two other justices (the respondents) at the request of A. and B., under the provisions of section 105 of the Act, heard the case and convicted the appellant. A. and B. though present in the court room as witnesses took no part in the proceedings.

The Supreme Court of New Brunswick ordered a non-suit to be entered.

On appeal to the Supreme Court of Canada, Held, affirming the judgment of the court below, Henry and Taschereau, JJ., dissenting, that, as the convic-

Canada Temperance Act, 1878—Continued.

tion was good on its face, until set aside it was a justification for respondents for anything done under it. Held, also, that upon the facts disclosed A. and B. were "absent," within the meaning of section 105 of the Canada Temperance Act, 1878.

Appeal dismissed with costs.

Byrne v. Arnold.—22nd June, 1885.

7. Scrutiny—Powers of County Judge.

Held, that a judge of the county court, on holding a scrutiny of votes under the provisions of the Canada Temperance Act, can only determine which side has a majority of the votes polled, by inspection of the ballots, and has no power to enquire into corrupt acts, such as bribery, etc., which might avoid the election (Henry, J., *dubitante*).

Chapman v. Rand, 22 C. L. J. 46—xi. 312.

Candidate.

See ELECTION.

Capias—Affidavit—Art. 798 C. C. P.—Want of reasonable and probable cause—Damages.

S., a debtor, resident in Ontario, being on the eve of departure for a trip to Europe, passed through the city of Montreal, and while there refused to make a settlement of an overdue debt with his creditors, McK., *et al.* who had instituted legal proceedings in Ontario, to recover their debt, which proceedings were still pending. McK., *et al.* thereupon caused him to be arrested, and S. paid the debt. Subsequently S. claimed damages from McK., *et al.*, for the malicious issue and execution of the writ of *capias*. McK., *et al.*, the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent, McK., one of the defendants, for his belief that the appellant was about to leave the Province of Canada were as follows:—"That Mr. P., the deponent's partner, was informed last night in Toronto by one H., a broker, that the said W. J. S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and defendant was himself informed, this day, by J. R., broker, of the said W. J. S.'s, departure for Europe and other places." The appellant S. was carrying on business as wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker, and all his business friends knew that he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by McK., that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due him, and that plaintiff answered him "that S. would not pay him, that he might get his money the best way he could."

Capias—Continued.

Held, that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors; and that the evidence showed the respondent had no reasonable and probable cause for issuing the writ of *capias* in question.

Shaw v. McKenzie.—vi. 181.

2. Issue of, in action—Bail—Order for discharge of—In discretion of court below—No appeal.

See JURISDICTION, 61.

Carriers—Liability of railway company as.

See RAILWAYS AND RAILWAY COMPANIES, 6.

2. Crown not liable as a common carrier.

See PETITION OF RIGHT, 10, 11.

3. Bill of lading—Carriage of goods by sea—Excepted perils—Negligence—Improper Stowage—Construction.

See BILL OF LADING, 5.

4. Railway company—Carriage of goods beyond terminus of line—Exemption from liability—Construction of Contract—Statutory liability—Joint tort feorsors—Release to one, effect of.

See RAILWAYS AND RAILWAY COMPANIES, 43.

5. *Common carrier—Special contract—Exemption from liability—Construction of terms—At owner's risk against all casualties.*

The Commercial Travellers Association of Ontario, by written agreement with the defendants' company, obtained for its members for the season of 1885 special privileges in travelling by the company's boats, one of the terms of the agreement being that the members should receive tickets at a reduced rate "With allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties." This agreement was continued during 1886 by verbal agreement between the manager of the company and the secretary and traffic manager of the association. D. a commercial traveller obtained a ticket for a passage on one of the company's boats under this agreement, paying the reduced fare, and took on board three trunks containing the usual outfit of a traveller for a jewellery house valued at about \$15,000. The trunks were checked in the usual way and no intimation was given by D. to any of the officials on the boat as to their contents. On the passage the contents of the trunks were damaged by the negligence of the officers of the company and an action was brought by D. and his employers to recover damages for such injury.

Carriers—Continued.

Held, affirming the decision of the Court of Appeal for Ontario, 15 Ont. App. R. 647, that the agreement between the Association and the Company was in force in 1886; that the term "baggage" in the agreement meant not merely personal baggage, such as every passenger is allowed to carry without extra charge, but commercial baggage, and would include the outfit in this case; and that in the expression "must be at owner's risk against all casualties," the words "against all casualties" do not limit, control or destroy, but rather strengthen, the protection which the former words "at owner's risk" afforded the defendants.

Present: Sir W. J. Ritchie, C.J., and Strong, Taschereau and Gwynne, JJ.

Dixon v. The Richillieu Navigation Co.—March 10, 1890.—xviii. 704.

6. Railway companies as carriers of passengers—Liability for latent defects in rails: Arts. 1053, 1675, C. C.

See RAILWAYS AND RAILWAY COMPANIES, 69.

COMMON CARRIERS.

Certiorari—Writ of.

See PRACTICE OF SUPREME COURT, 31, 32.

HABEAS CORPUS, 3.

Certificate of Engineer—When necessary as condition precedent to recovery for extra work.

See PETITION OF RIGHT, 1, 2, 8.

CONTRACT, 27, 28.

2. Condition precedent to issue of bonds.

See RAILWAYS AND RAILWAY COMPANIES, 9.

3. Whether a progress or final estimate.

See CONTRACT, 9.

4. Failure to obtain within a reasonable time—Railway contract.

See CONTRACT, 28.

5. Contract with Crown for construction of bridge—Certificate of engineer—Condition precedent.

See CONTRACT, 35.

**6. Contract—Claim for extra and additional work done on I. C. R.
—Final certificate of engineer—Condition precedent.**

See CONTRACT, 38.

Certificate of Engineer—Continued.

7. Sub-contract for work done on N. S. Ry.—Engineer's certificate
—Condition precedent.

See CONTRACT, 89.

8. Contract—Finality of engineer's certificate—Bulk sum contract
—Deductions—Powers of engineer—Interest.

See CONTRACT, 53.

Cestui Que Trust.

See SALE OF LANDS, 5.

TRUSTS AND TRUSTEES.

Champertry—Champeritous agreement—Administration proceedings—Proving claim on promissory notes—Subsequent proof by original holder—Statute of limitations—Practice.

The respondents, W. P. Howland & Co. being holders of certain promissory notes made in their favour by one A. M. Cannon, deceased, made the following agreement with one Oates :

"Toronto, Feb. 28th, 1884.

"I have this day bought from Messrs. W. P. Howland & Co. three promissory notes made in their favor by A. M. Cannon, one for \$1,000, due one year after date; one for \$3,218, due two years after date; and one for \$3,218, due three years after date, all three bearing date Sept. 5th, 1877, in consideration for which I agree to pay the said W. P. Howland & Co. one-half of the net amount I receive on account of the said notes, and I agree to use my best endeavours to collect the same, and if, at the expiration of two years, I have been unable to collect any portion of the said notes, I hereby agree to return them to the said W. P. Howland & Co., free from any costs or charges incurred by me. But, if, at any time previous to the expiration of the two years above mentioned, I have succeeded in collecting any portion of the said notes, then their portion above mentioned will be due and payable to the said W. P. Howland & Co.

"WM. H. OATES."

During the currency of that agreement Oates applied for and obtained on the 19th September, 1884, an order for the administration of the estate of the said A. M. Cannon, of whose personal estate Mary Ellen Cannon the defendant (appellant), was administratrix.

The usual advertisement for creditors was published, and under it one Taylor proved a claim under the reference as a creditor of the deceased, and his claim had been duly allowed by the Master prior to the month of October, 1886.

The defendant Cannon, applied by petition to have the claim of the said Oates upon the promissory notes in question disallowed, on the ground that the title by which he claimed the same was champeritous and void.

Champerty—Continued.

Proudfoot, J., on the said application, by order dated 23rd October, 1886, adjudged that Oates's title to the said notes, under the agreement aforesaid, was champertous and void, and that he could not prove in the administration by virtue of his title thereto, but he held that the administration order of 19th September, 1884, was for the benefit of all the creditors of the estate of Cannon, deceased, one of whom had proved a claim and he therefore refused to set it aside. (Reported 13 Ont. Reports, p. 70.).

Neither party appealed from this order. Thereupon Oates redelivered the notes to Howland & Co., who up to this time had been in no way party or privy to the proceedings for administration. The six years allowance by the Statute of Limitations had expired before the notes were redelivered, but not before the date of the administration order. The reference had not been concluded, nor any report made by the Master. The respondents then applied for liberty to come in and prove their claim on the notes, and the Master allowed them to do so. From this ruling the appellant appealed.

While the last mentioned appeal was pending, the respondents came before the said Master to prove their claim, pursuant to the said leave granted, and the Master allowed their claim upon the said promissory notes. From this allowance the appellant appealed, and the last mentioned appeal came on for argument at the same time as the appeal from the Master's exercise of discretion in granting leave to the respondents to prove their claim. Both appeals were dismissed by Proudfoot, J., who held that the order for administration prevented the bar of the Statute of Limitations; and that H. & Co. might assert their title to the notes and prove on them, notwithstanding the former agreement with O., which he had already held to be champertous. This judgment was affirmed by the Court of Appeal for Ontario.

On appeal to the Supreme Court of Canada **Held** that the appeal should be dismissed.

Per Gwynne, J.—I am unable to perceive upon what right the maker of an unquestionably valid note or his personal representative can in any proceeding taken by the payee to recover upon the note, institute an enquiry as to what the payee may have done with the note in the interval elapsing between the making of the note and the proceeding taken to recover payment of it. Howland & Co. who are the payees of the note, cannot as it appears to me be affected by the adjudication in the proceeding instituted by Oates, to which they were not a party, and while the administrator's order remains in force they are entitled to prove the debt represented by the notes and to the benefit of that order in preventing the Statute of Limitations to run. If a champertous dealing in respect of the notes between Howland & Co. and Oates, could affect their right to prove they must have a right to insist that the dealing was not affected with the vice of champerty, notwithstanding the adjudication on the tender of proof by Oates. And if it were necessary to decide that point, I should be of opinion that in the transaction with Oates, there was no champerty. A promissory note in the hands of the payee is as much a piece of property as an acre of land, or a horse, a quantity of merchandise, or any other chattel and the agreement made between Howland & Co. and Oates in respect of the notes upon the occasion of their being transferred to him under

Champerty—Continued.

the special agreement in evidence, was no more champertous than would a like agreement have been in case the property transferred had been an acre of land, a horse, a quantity of merchandise or any other chattel. Moreover the maker of the note, or his personal representative, who did not dispute their liability upon the notes, had no right as it appears to me, to institute an enquiry as to what were the terms as between the payees and their transferees upon which the notes were transferred to the holder.

Present : Strong, Fournier, Taschereau and Gwynne, JJ.

Cannon v. Howland.—14th June, 1889.

Chancery, Court of

See COURT OF CHANCERY.

**Charitable Trust—Grant to Township of Land for School—
Charitable Trust—Acceptance of by trustees—Discretion
of Trustees—Doctrine of cypres.**

By the patent or grant of the township of Cornwallis, in King's county, N. S., made in 1761, four hundred acres of land were declared to be "for the school." By a subsequent grant from the Crown in 1790, the said four hundred acres were declared to be vested in the rector and wardens by name of the church of St. John in the said township, and the rector and wardens of the said church for the time being, in special trust, to and for the use of one or more school or schools, as may be deemed necessary by the said trustees, for the conveniency and benefit of all the inhabitants of the said township of Cornwallis, and in trust that all schools in said township furnished or supplied with masters qualified, agreeable to the laws of this province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof, shall receive and instruct free of expense, such poor children as may be sent them by the said trustees. There were no words in the last mentioned grant which would make the estate thereby conveyed an estate of inheritance. The grantees took possession of the land mentioned in said grant, and they and their successors in office have ever since remained in possession of it; and until the year 1873, the rents and profits arising from such land, were distributed among the schools of said township, and poor children sent by the trustees to, and educated in said schools according to the terms of the trust.

In 1873, however, the then trustees discontinued such distribution, and allowed the funds realized from said lands to accumulate, the reason alleged therefor being, that the schools of the township had become so numerous that the sum apportioned to each would be too small to be of use, and also that under the free school system all the poor children of the township were educated free of expense, and the object for which such funds had previously been supplied no longer existed.

The present defendants were invested with the said trust in 1879, when the revenue of the said lands had accumulated until they amounted to over \$1,200.

Charitable Trust—Continued.

Shortly after they became such trustees it was determined to build a school house in a certain district in the said township with the money. A meeting of the vestry of the church was held, and a resolution passed authorizing such school house to be built on land leased from the church. The school was to be non-sectarian, but after school hours any of the children that wished could receive instruction in the doctrines of the Church of England.

In a suit to restrain the defendants from using the trust funds to build such schoolhouse, and praying for an account,

Held, reversing the judgment of the Supreme Court of Nova Scotia, and restoring that of the court of first instance, that the trustees had no discretion as to the application of the trust funds, but were bound to distribute them among all the schools of the township, which would be entitled to participate under the terms of the trust, however wanting in utility such a disposition of said funds might be.

Held, also, that the Attorney-General of the province was the proper person to bring this suit.

Held, *per* Strong, J., that in interpreting the trust, in order to explain the apparent repugnancy in the grant in providing that the rents were to be distributed among one or more schools, etc., and also among all the schools in the township, the probable condition of the township in respect to the number of schools therein, at the time the grant was made, coupled with the long continued usage which has prevailed in the manner of administering the trust, could be considered as a rule of guidance for such interpretation.

Held, also, *per* Strong, J., that under the doctrine of *cyprès*, a reference might be made to the master to report a scheme for the future administration of the charity.

Attorney-General v. Axford.—12th May, 1885—xiii. 294.

Charter—Of incorporated company—Forfeiture of, for non-performance of condition precedent to legal organization of company—Proceedings—Form of—*Scire facias*—44 V. c. 6 (D.)—R. S. C. c. 21, s. 4—C. C. P. Art. 997 *et seq.*

See CORPORATIONS, 48.

Charter Party.

See SHIPS AND SHIPPING, 4, 8, 11.

Chattel Mortgage—*Passing after acquired property*—*Partus sequitur ventrem*—*Novus actus interveniens*—*Trover against sheriff*.

The plaintiffs were the grantees and one Hackett the grantor in a bill of sale, by way of mortgage, which conveyed among other property, four horses. In the mortgage there was a proviso that until default Hackett might remain in possession of all the property mortgaged, but with full power to the plaintiffs, in default of payment, to take possession and dispose of the property as

Chattel Mortgage—Continued.

they should see fit. After default in payment of principal and interest, a mare, one of the four horses described in the mortgage, dropped a foal. This foal, together with a horse which was also in possession of Hackett, but as to which no question was raised, it not being one of the horses comprised in the mortgage, was seized by defendant (sheriff) under an execution against Hackett.

On appeal from the Supreme Court of New Brunswick (see 4 Pugs. & Bur. 246) **Held**, that it being established by the evidence that the foal was dropped after default made and therefore while plaintiffs were owners and entitled to possession of the mare, such foal was their property—*partus sequitur ventrem*.

The following judgment was rendered by Sir W. J. Ritchie, C.J.:

One Hackett made a chattel mortgage to the defendants dated 4th September, 1875, whereby he bargained and sold "all my household furniture of every kind and description, as also all stoves and kitchen utensils, together with all crockeryware, beds and bedding, also *four horses*, one cow, two waggons, one coach, harnesses, also all liquors, notes, and any and all other personal property, of every nature, kind and description owned or to be owned by me, including any and all renewal stock or stocks to be purchased by me the said Thomas Hackett."

"And provided also that until default the said Thomas Hackett may remain in possession of all the property hereby mortgaged or intended so to be, but with full power to the said John W. Nicholson and John James Fraser and E. Byron Winslow, their survivors or survivor, or the executors or administrators of such survivor, in default in payment of the said several sums of money so secured by said several mortgages before referred to, or in case any of the said property hereby mortgaged should be attached or seized by any other creditors or creditor of the said Thomas Hackett, or for any other good cause that then or in any or either of such cases the said John W. Nicholson and John James Fraser and E. Byron Winslow, the survivors or survivor of them or the executors or administrators of such survivor may immediately take possession of the whole of the property hereby mortgaged, and sell and dispose of the same in such manner as they may consider best and to retain the proceeds after deducting all expenses towards liquidating said indebtedness secured by said mortgages according to their priority on the registry as aforesaid, and also any further indebtedness of or claims against the said Thomas Hackett, which the said John W. Nicholson may have for advances, notes indorsements or otherwise and whether the same have matured or not, and any surplus to be paid to the said Thomas Hackett, his executors, administrators or assigns."

The defendant as sheriff of the county of York, seized under a writ of *fi. fa.* against Hackett, a horse and a colt. No question is now in controversy as to the horse, but plaintiffs claim the colt as their property, which claim was recognized by the Supreme Court of New Brunswick and a verdict for it was given in the plaintiff's favour and confirmed by that court. From this judgment the present appeal is taken. The colt was a progeny of a mare, one of the four horses mentioned in the bill of sale, and was foaled in May, 1878, about 32 months after date of bill of sale. At the time this colt was foaled

Chattel Mortgage—Continued.

It is quite evident, from the evidence of Hackett and Winalow, and from the terms of the mortgage in evidence, that there must have been default in payment of both principal and interest money secured by the chattel mortgage, and therefore it is clear plaintiffs were at law the absolute owners of the mare and entitled to take possession and dispose of her at any moment they thought fit, and the foal having been dropped while plaintiffs were such owners of the mare, the colt necessarily was their property—*partus sequitur ventrem*—and so no question as to after acquired property as to the colt arises, and no other question has been raised in this case. It is clear therefore defendant was not justified in seizing and selling under a *f. fa.* against Hackett the plaintiff's property, and therefore they were clearly entitled to recover, and the verdict and judgment in the court below was quite correct. The appeal must be dismissed with costs.

Temple v. Nicholson.—3rd March, 1881.

2. Rights of the Crown as against mortgagee for slidage dues.

See PETITION OF RIGHT, 18.

3. *Security for after acquired property—Agreement not to register—Assignment in trust by mortgagor—Legal title of trustee in goods mortgaged—Equitable title of mortgagee—Priority.*

In May, 1880, the defendant Davidson, being indebted to the plaintiffs in the sum of \$8,000, gave them a chattel mortgage on all his stock in trade, chattels and effects then being in the store of the said defendant, Davidson, on Granville street, in the city of Halifax; and by the said mortgage the said defendant further agreed to convey to the plaintiffs all stock which during the continuance of the said indebtedness he might purchase for the purpose of substituting in place of stock then owned by him in connection with his said business. These goods were never so conveyed to the plaintiffs. By the terms of the mortgage the debt due to the plaintiffs was to be paid in three years, in twelve equal instalments at specified times, and if any instalment should be unpaid for fifteen days after becoming due, the whole amount then due the plaintiffs would become immediately payable, and they could take possession of and sell the said mortgaged goods. It was further agreed between the said defendant and the plaintiffs that to save the business credit of Davidson the said mortgage was not to be filed and was to be kept secret; and it was not filed until Dec. 12th, 1881. On the 13th Dec., 1881, Davidson made an assignment of all his property, real and personal, to the defendant Forsyth in trust for the benefit of his (Davidson's) creditors, and such trust deed was executed by Davidson, Forsyth, and one of Davidson's creditors, and subsequently by a number of other creditors. At the time of the execution of this deed Forsyth had no notice of the mortgage to the plaintiffs. Forsyth took possession of the goods in the store on Granville street and refused to deliver them to the plaintiffs, who demanded them on December 14th, default having been made in the payments under the mortgage, and the plaintiffs brought this suit for the recovery of the goods and an account. Previous to the suit being com-

Chattel Mortgage—Continued.

menced the defendant Forsyth delivered to the plaintiffs a small portion of the goods in the store, which, as he alleged, were all that remained from the stock on the premises in May, 1880.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Strong, J., dissenting, that the legal title to the property vested in the defendant must prevail, the plaintiff's title being merely equitable and the equities between the parties being equal.

McAllister v. Forsyth.—xii. 1.

4. *Insufficient description of goods—Cons. Stats. Man. c. 49, s. 5.*

One Louisa Black was indebted to the plaintiff in the sum of \$4,000, or thereabouts, and to secure the debt gave the plaintiffs a chattel mortgage on her stock in trade. In such mortgage the goods were described as "all and singular the goods, chattels, furniture, and household stuff hereinafter particularly mentioned and described, and particularly mentioned and described in the schedule hereunto annexed marked A., all of which goods and chattels are now situate and lying on the premises situate in a building on the east side of Maine street, in the city of Winnipeg, on the Grace Church property, and now being occupied by the said Louisa Black as a millinery store and dwelling, which said building may be more particularly known as number two hundred and ninety-one (291) Main street, in the said city of Winnipeg." The schedule was merely a list of the various articles, as so many yards of ribbon, or cloth, with the price opposite each item. In many instances articles were mentioned with figures before them and figures after them, so that only a person acquainted with the character of the goods could tell anything about the quantities. The defendants were also creditors of the said Louisa Black and having obtained judgment on their respective debts, issued executions under which the sheriff seized the goods on the said premises, No. 291 Main street. The plaintiffs claimed that the goods seized belonged to them under the said chattel mortgage and the title to them was tried before the Chief Justice of the Court of Queen's Bench of Manitoba, in chambers, when judgment was given for the defendants, the Chief Justice holding the chattel mortgage void, both under the statute of Eliz., and under ch. 49 of the Consolidated Statutes of Manitoba. The Court of Queen's Bench refused to set this judgment aside.

On appeal to the Supreme Court of Canada it was **Held**, affirming the judgment of the court below, Strong and Henry, JJ., dissenting, that the description of the goods was not such that they might be readily and easily distinguished, and the mortgage was therefore void against the execution creditors.

McCall v. Wolf—12th May, 1885—xiii. 130.

5. *Mortgage given by Insolvent Company—Preference.*

See FRAUDULENT PREFERENCE, 4.

6. *Condition against Assignment in Policy of Insurance—Chattel Mortgage not a breach of.*

See INSURANCE, FIRE, 16.

Chattel Mortgage—Continued.

7. *Fraudulent as against creditors—Assignment in trust by mortgagor—Suit by creditors to set aside mortgage—Mortgagees not included as plaintiffs—Trust deed not attacked.*

Where a trader who was in insolvent circumstances had given a chattel mortgage on his stock in trade to secure a debt, and shortly after executed an assignment in trust for the benefit of his creditors,

Held, affirming the judgment of the courts below, that the mortgage was void under the statute, and that certain simple contract creditors of such trader could maintain a suit, on behalf of themselves and all other creditors except the mortgagees, to set aside the mortgage without including the mortgagees as plaintiffs, and without attacking the assignment in trust.

McCall v. McDonald.—xiii. 247.

8. Assignment by directors of a joint stock company of all estate and property to trustees for benefit of creditors—*Quære*, is such an assignment within R. S. O. chapter 119 (Ont. Chattel Mortgage Act)?—Description of property sufficient under section 23—*McCall & Wolff* 13 Can. S. C. 130 approved and distinguished.

See CORPORATIONS, 80.

9. *Possession of goods under—Right of mortgagor to sell—proviso as to—Ordinary course of trade—Seizure of goods under execution—Justification for.*

In a chattel mortgage containing no redemption clause there may be an implied contract that the mortgagor shall remain in possession until default, of equal efficacy with an express clause to that effect; and such an implied contract necessarily arises from the nature of the instrument, unless it be very expressly excluded by its terms. *Porter v. Flintoff* (6 U. C. C. P. 335) distinguished.

In a chattel mortgage of the stock in trade and business effects of a trader there was a proviso to the effect that if the mortgagor should attempt to sell or dispose of the said goods the mortgagee might take possession of the same as in case of default of payment.

Held, that this proviso only prohibited the sale of the goods other than in the ordinary course of business. (*Ritchie, C.J., contra.*)

The mortgagee of the chattels seized the mortgaged goods under an execution in a suit for the debt secured by the mortgage. The execution was set aside as being against good faith. In an action for the wrongful seizure and conversion of the goods.

Held, that the mortgagee could not justify the seizure under the mortgage.

Dedrick v. Ashdown.—xv. 227.

Chattel Mortgage—Continued.**10. Action to set aside—Fraudulent as against creditors—13 Eliz. c. 5—Right of creditor of mortgagor to redeem.**

Plaintiffs, having recovered judgment against one H., issued execution under which the sheriff professed to sell certain goods of H., and gave a deed to plaintiffs conveying all the "share and interest" of H. in the goods. Six months before the recovery of the plaintiffs' judgment, H. had made a mortgage covering all the goods proposed to be sold by the sheriff. The plaintiffs filed a bill to set this mortgage aside as fraudulent under the statute of Eliz., and fraudulent in fact. The court below held the mortgage good and dismissed the bill.

Held, affirming this judgment, that no fraud being shown and the plaintiffs not offering to redeem the mortgage, the action was rightly dismissed.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Halifax Banking Co. v. Matthew.—April 80, 1889—xvi. 721.

11. Bill of sale—Registry—Defective affidavit—Assignment for benefit of creditors—Writ of execution—Signature of prothonotary—Seal of court.

An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor is a bill of sale within section 4 of the Nova Scotia Bills of Sale Act, R. S. N. S. 5th ser. c. 92, it not being an assignment for the general benefit of creditors and so excepted from the operation of the Act by section 10.

The omission of the date and words "before me" from the jurat of an affidavit accompanying a bill of sale under section 4 of the said Act makes such affidavit void and the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods. Gwynne, J., dissenting.

Per Gwynne, J.—Section 4 of the Act only applies to bills of sale by way of chattel mortgage and not to an assignment absolute in its terms and upon trust to sell the property assigned.

Archibald v. Hubley.—xviii. 116.

12. Chattel mortgage—Renewal—One year from date of filing—Description of goods—Sufficiency of.

The ordinance of the North-West Territories relating to chattel mortgages (Ordinance of 1881, No. 5) provides by section 9 that "every mortgage filed in pursuance of this ordinance shall cease to be valid as against the creditors of the persons making the same after the expiration of one year from the filing thereof, unless a statement, etc., is again filed within thirty days next preceding the expiration of the said term of one year." A chattel mortgage was filed on August 12th, 1886, and registered at 4.10 p.m. of that day. A renewal of said mortgage was registered at 11.49 a.m. on August 12th, 1887.

Chattel Mortgage—Continued.

Held, affirming the decision of the court below, that the renewal was filed within one year from the date of the filing of the original mortgage as provided by the ordinance.

Per Patterson, J.—In computing the time mentioned in this section, the day of the original filing should be excluded, and the mortgagee would have had the whole of the 12th August, 1887, for filing the renewal.

Section 6 of the same ordinance provides that: "All the instruments mentioned in this ordinance, whether for the mortgage or sale of goods and chattels, shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished." The description in a chattel mortgage was as follows: "All and singular, the goods, chattels, stock-in-trade, fixtures, and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mortgagors on the north half of section six, township nineteen, range twenty-eight west of the fourth principal meridian."

Held, affirming the decision of the court below (1 N. W. T. Rep. No. 1, p. 88) that the description was sufficient. *McCall v. Wolf*, 13 Can. S. C. R. 180 (*see Chattel Mortgage*, 4) distinguished. *Hovey v. Whiting*, 14 Can. S. C. R. 515 (*see Corporations*, 30) followed.

Present:—Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Thomson v. Quirk.—June 14th, 1889—xviii. 695.

13. *Bill of sale—Affidavit of bona fides—Adherence to statutory form—Proof of execution—Attesting witness.*

Where an affidavit of *bona fides* to a bill of sale stated that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, while the form given in the statute uses the words "against any creditors of the bargainor," such violation did not avoid the bill of sale as against execution creditors, the two expressions being substantially the same. Gwynne, J., dissenting.

The statute requires the affidavit to be made by a witness to the execution of the bill of sale but as attestation is not essential to the validity of the instrument its execution can be proved by any competent witness.

Judgment of the Supreme Court of the N.W.T. affirmed.

Emerson v. Bannerman.—xix. 1.

14. *Preference given by—Pressure—Intent— 49 V. c. 45, s. 2, (Man.)*

See ASSIGNMENT, 21.

15. *Fraud against creditors—Prior agreement—Additional chattels in mortgage—Effect of.*

B. sold a quantity of machinery, tools and fixtures to one P. for \$3,120.90. The goods were in a factory owned by B. and were to be paid for by monthly

Chattel Mortgage—Continued.

payments, extending over a period of forty-eight months. P. agreed to keep them insured in favour of B. and to give B. a hire receipt or chattel mortgage, as security for payment. P. was put in possession of the property, and received letters from B. recommending him to certain merchants in Montreal, and he went to Montreal and purchased goods from L. among others.

Two months after L. sued P. for the price of goods so purchased, amounting to about \$1000 and after being served with the writ in such suit, P. gave B. a chattel mortgage on the goods originally purchased and other goods which it was alleged would have been included in the purchase from B. had it not been claimed that they were not in the factory at the time, but were afterwards found to be there. P. had not given a hire receipt or chattel mortgage at the time of the original purchase from B.

L. having signed judgment against P. issued execution, and caused the mortgaged goods to be seized thereunder. On the trial of an interpleader issue to try the title in said goods, judgment was given in favour of B. for the goods originally sold to P. but not for those added in the mortgage. The Divisional Court held, on motion to set aside this judgment, that the mortgage was void for the inclusion of the goods not mentioned in the original agreement and reversed the judgment at the trial in B.'s favour. This decision was affirmed by the Court of Appeal for Ontario. On appeal to the Supreme Court of Canada—

He d., that the judgment of the Court of Appeal should be affirmed.

Present: Ritchie C.J. and Fournier, Taschereau, Gwynne and Patterson, JJ.

Brown v. Lamontague.—26 C. L. J. 306.—14th June, 1889.

16. Waterlot and mill—Dealt with by instrument in form of chattel mortgage—Sufficiency of, in equity.

See VENDOR AND PURCHASER, 4.

17. *Bill of sale—Affidavit of bona fides—Adherence to statutory form—Description of grantor—R. S. N. S. 5th Ser. c. 92, ss. 4 and 11.*

The Act in force in Nova Scotia relating to bills of sale, R. S. N. S. 5th Ser. c. 92, requires by section 4, that every such instrument shall be accompanied by an affidavit by the grantor, and section 11 provides that the affidavit shall be, as nearly as may be, in the form given in schedules to the Act. The form prescribed begins as follows: I, A. B., of in the county of (occupation) make oath and say. An affidavit accompanying a bill of sale having omitted to state the occupation of the grantor—

Held, per Strong, Gwynne and Patterson, JJ., that as the affidavit referred in terms to the instrument itself, in which the occupation of the deponent was stated, the statute was complied with.

Chattel Mortgage—Continued.

Per Taschereau, J., The onus was upon the persons attacking the bill of sale to prove, by direct evidence, that the grantor had no occupation, which they had failed to do.

The judgment of the Supreme Court of Nova Scotia was reversed.

Smith v. McLean.—*xxi. 355.*

**18. Preference—Bona fide advance—Consideration partly bad—
Effect on whole instrument—R. S. O. 1887, c. 124, s. 2.**

R. being in insolvent circumstances applied to P. his uncle for a loan of \$5,000, which he received, P. mortgaging his house for part of the amount and giving his note for the balance which R. had discounted. The security for this loan was a chattel mortgage on R.'s stock of goods in his store. The money was applied by R. chiefly in taking up notes made by him and indorsed by his relatives. P. knew when he advanced the loan that R. was insolvent, but it was not shown that he knew how the money was to be applied.

R. gave another chattel mortgage to M. for another loan of money applied in the same way, but it was shown that part of the loan was R.'s own money though alleged to have been advanced by his wife.

An action was brought on behalf of R.'s creditors to have these mortgages set aside as being void under R. S. O. 1887, c. 124, s. 2, and at the trial before the Chancellor both were set aside. The Court of Appeal reversed the decision setting aside the mortgage to P., and affirmed that setting aside the mortgage to M., holding as to the latter, following *Commercial Bank v. Wilson*, 3 E. & A. Rep. 257, that the mortgage being void in part for illegal consideration the whole instrument was void.

Held, affirming the decision of the Court of Appeal in *Campbell v. Patterson*, 16 Ont. App. R. 646, *sub nom. Campbell v. Roche*, that the mortgage to P. being given for an actual *bona fide* advance the provisions of section 2 of the Ontario statute did not apply to it especially as P. was not shown to have had knowledge of R.'s motive in procuring the loan.

Held, also, over-ruling the decision in *Mader v. McKinnon*, 18 Ont. App. R. 646, *sub nom. McKinnon v. Roche*, in so far as *Commercial Bank v. Wilson* was followed, that that case was decided under the statute of Eliz. and is not now law under the Ontario statute, and a mortgage may be set aside as to part and maintained as to the remainder, but affirming the judgment of the Court of Appeal on the ground that the evidence showed the whole of the consideration for M.'s mortgage to be illegal and bad.

Appeals dismissed with costs.

Present: Strong, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Campbell v. Patterson,
Mader v. McKinnon, } 20th Feb., 1893.

Church—St. Andrew's Church, Montreal.

See PEWHOLDER, 1.

Church—Continued.

2. Defendant sued as trustee of property belonging to—Denial of quality.

See PETITORY ACTION.

3. Church rates—Action for, (P. Q.)—Amount under \$2,000—Not appealable.

See JURISDICTION, 40.

Circuit Court, P. Q.—When case has originated in, no appeal lies to Supreme Court.

See JURISDICTION, 26.

Clergyman—Diocesan Church Society of N. S.—Fund for distribution among clergymen—Rule as to—Construction of.

See DIOCESAN FUND.

Coasting Voyage—Time policy for.

See INSURANCE, MARINE, 8.

Cobourg Harbour Works.

See ACCRETION, 1.

Collision.

See RAILWAYS AND RAILWAY COMPANIES, 2.

2. With anchor of vessel—Damages.

See MARITIME COURT OF ONTARIO, 2.

3. Between tug towing raft and tug at anchor in Detroit River.

See MARITIME COURT OF ONTARIO, 4.

Colorable Employment.

See ELECTION.

Combination.

See PATENT OF INVENTION, 1, 4, 5, 7.

Comity of Nations — *Foreign corporation — Contract within Canada — Operating telegraph line — Exclusive privilege — Restraint of trade.*

A foreign telegraph company has a right to enter into a contract with a railway company in Canada for the exclusive privilege of constructing and operating a line of telegraph over the road of such railway company provided the contract is consistent with the purposes for which the foreign company is incorporated and not prohibited by its charter nor by the laws of the province

Comity of Nations—Continued.

of Canada in which the contract is made. The right of a foreign corporation to enter into such a contract, and carry on the business provided for thereby, is a right recognized by the comity of nations.

Canadian Pacific Railway Co. v. The Western Union Telegraph Co.—xvii. 151.

And see CONTRACT, 36.

Commission—Contract to sell on.

See CONTRACT, 10.

2. To examine witnesses.

See INTERROGATORIES, 2.

3. Of real estate agents selling lands.

See SALE OF LANDS, 12.

Commissioner—Of sewers—Under R. S. N. S. c. 40.

See TRESPASS, 10.

Common Carriers—Contract by one for several—Bills of lading—Terms of contract—Custody of goods—Delivery—Negligence.

The M. D. T. Co., through one B., contracted with H. to carry a quantity of butter from London, Ontario, to England, and the bills of lading were signed by B., describing himself as agent severally, but not jointly, for the G. W. Ry. Co., the M. D. T. Co. and the G. W. S. S. Co. named as carriers therein. The G. W. Ry. Co. were to carry the goods from London to the Suspension Bridge, the M. D. T. Co. from the Suspension Bridge to New York, and it was then to be delivered to the S. S. Co. for carriage to England. It was provided by one clause in the bill of lading that if damage was caused to the goods during transit the sole liability was to be on the company having the custody thereof at the time of such damage occurring. The butter was carried to New York, where it was taken from the car and placed in lighters owned by the M. D. T. company to be conveyed to the steamer "Dorset" belonging to the S. S. Co. On arriving at the pier where the steamer lay, the lighter could not get near enough to unload, and the stevedore in charge of the steamer had it towed across the river with instructions for it to remain until sent for. The "Dorset" sailed without the butter, which was sent by another steamer of the S. S. Co. some five days later. The butter was damaged by heat while in the lighter.

Held, affirming the judgment of the court below, that the M. D. T. Co., having made a through contract for the carriage of the goods, they were liable to H. for the damage, and even under the bill of lading were not relieved from liability, as the butter was never delivered to, and received by, the S. S. Co., but was in the custody of the M. D. T. Co. when the damage occurred.

Merchants' Despatch Transportation Co. v. Hately—xiv. 572.

Common Carriers—Continued.**2. The Crown not a common carrier.**

See PETITION OF RIGHT, 10, 11.

RAILWAYS AND RAILWAY COMPANIES.

Community—Assets of first and second community—Transfer of arrears of life-rent by wife to the grandson of her second husband, validity of—*Edit de secondes nocés, 1560—Arts. 279, 282 and 283, Custom of Paris, and Arts. 1760, 1265 and 774 C. C. (P.Q.)—Costs—Error of date in deed of transfer.*

On the 17th February, 1841, C. and wife acknowledged by deed that they were indebted to one S. N., widow of one P., in the sum of \$140, due to her late husband. On the same day C. and wife, the son-in-law and daughter of S. N. and P., also acknowledged to be indebted to S. N. in an annual life-rent, in consideration of certain real estate given to them previously by the late P. and S. N., by deed of gift, 16th February, 1830. On 19th February, 1841, the widow, S. N., married one J. B. L. On the 21st January, 1870, J. B. L. and his wife, S. N., transferred to P. L., the grandson of J. B. L., all the arrears of life-rent due them by C. and his wife as well as the sum of \$140, being the amount of the obligation.

In an action brought by P. L. against C. and his wife, to recover £1,325 for 26 years of said life-rent, and £35 for the amount of the obligation of the 17th February, 1841.

Held—1. Affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), that the arrears of the life-rent which accrued during the second marriage of S. N. belonged to the community which existed between her and her second husband, J. B. L., and that the husband as head of the community could legally dispose of his share in the community, viz., one half of said arrears, in favour of his grandson, P. L., but the transfer as to the other half belonging to his wife, S. N., was null, as by law S. N. could not transfer to any of her husband's descendants, who, in such a case, are by law considered as persons interposed to secure directly to the husband a benefit which cannot be conferred upon him directly.—Art. 774, C. C. (P.Q.)

2. Reversing the judgment of the court *a quo*, that although the sum of \$140 formed part of the movables belonging to the first community, yet the half of said sum belonging to S. N. at the time of her second marriage formed part of the second community, and her husband, J. B. L., could legally dispose of his share in said sum, viz., \$35 in favour of his grandson, the transfer of the balance, \$105, being null and void.

In this case both parties appealed to the Supreme Court, and the respondents having succeeded in getting the judgment of the court *a quo* reversed on the second point and confirmed on the first point, were allowed costs of a cross appeal.

In plaintiff's declaration it was alleged that the arrears of rent transferred to him and which he claimed from defendants, were due in virtue of a life-rent

Community—Continued.

constituted by a deed of cession, dated 16th February, 1828, and in the Superior Court, after argument, a motion was made by plaintiff to discharge the *délibéré* inasmuch as it was discovered at the argument that a clerical error of a serious nature to the interests of the present plaintiff had inadvertently crept into one of the authentic documents invoked by the plaintiff in support of his action, such error being as to the date of a certain donation upon which the action is mainly based; and inasmuch as such clerical error could most easily be remedied by referring to the minute of the notary who passed the deed or otherwise, this motion was granted, and a second motion was made by the plaintiff *en reprise d'instance*, praying to be allowed to amend the declaration by adding under count No. 10 in the declaration the following, to wit: "That the date of the constitution of the rent above mentioned was erroneously mentioned in the deed of transfer above related as being made by and in virtue of the contract of marriage of the said A. C., dated the 7th February, 1828.

"That the said constituted rent is made by a deed of the 16th February, 1830, as it appears from an authentic copy of said deed forming part of exhibit number one of the plaintiff in this cause, and that the intention of the parties to the said deed of transfer at the time of the execution thereof was to transfer the arrears of rent constituted by the said defendant on the 16th February, 1830. The said rent being the only one due by the said A. C., to the said S. N."

Held, affirming the judgment of the courts below, that the error in the transfer, as to the date of the deed under which the life-rent was due, was a mere clerical error. There was no other life-rent to which the transfer could apply but the one in question. The claim was sufficiently identified by the description of the deeds and the date of their registration, under the special allegations of the plaintiff and the evidence which he has adduced.

Pilon v. Brunet—v. 318.

2. Movable property governed by law of owner's international domicile. Art. 1260, C. C., is subject to Art. 6, C. C.

See DOMICILE, 2.

**Commutation Fund—Member of Synod—Trust, construction of
—Vested rights—By-law.**

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the Synod to be from time to time passed for that purpose." In 1860, a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each \$200, with a provision for increase in certain events. In 1873, the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the Church Society) repealed all previous by-laws respecting the fund, and made a different appropriation of it.

Commutation Fund—*Continued.*

Held, affirming the judgment of the Court of appeal for Ontario, (Fournier and Henry, JJ., dissenting), that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and making a different appropriation of it, for the support and maintenance of the clergy of the diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition. *See* case as reported in 29 Grant, 348 and 9 Ont. App. R. 411.

Wright v. Incorporated Synod of the Diocese of Huron—xi. 95.

Companies' Act, 1862 (Imp.)—Order making calls against past member—Action—Declaration, form of—Demurrer.

See CORPORATIONS, 15.

Company.

See BENEFIT SOCIETY.

CORPORATIONS.

RAILWAYS AND RAILWAY COMPANIES.

WINDING UP.

Compromise—Deed of—Action to set aside for fraud and coercion.

See PARTITION.

Condition Precedent.

See CONTRACT, 8, 35, 38, 39, 48.

INSURANCE, MARINE, 3.

PETITION OF RIGHT, 1, 2, 8, 16.

RAILWAYS AND RAILWAY COMPANIES, 9.

SALE OF LANDS, 2.

TRUSTS AND TRUSTEES, 21.

Consignment—Of goods—Payment—Property.

See SALE OF GOODS, 7.

Conspiracy—Between Deputy Returning Officer and Candidate's agent to interfere with franchise by marking ballots.

See ELECTION, 21.

Constitutional Law—B. N. A. Act, 1867, ss. 91 & 92—Brewer's Licenses. ii. 71.

See LEGISLATURE, 2.

2. **Legislative Assembly**—Power of, to punish for contempt.

ii. 159.

See LEGISLATURE, 9.

Constitutional Law—Continued.

3. B. N. A. Act, 1867, ss. 18, 41, 91, 92, s-s. 13 & 14, ss. 101, 129—Dominion Controverted Elections. iii. 1.

See ELECTION, 4.

LEGISLATURE, 1.

4. B. N. A. Act, 1867, s. 91, s-s. 27, 38 V. c. 47—Power of police and stipendiary magistrates to try in a summary manner felonies and misdemeanours. 15th Nov., '79.

See HABEAS CORPUS, 2.

5. B. N. A. Act, 1867, s. 91, s-s. 2, s. 92—Canada Temperance Act, 1878—Power to prohibit sale of intoxicating liquors.

iii. 505.

See PARLIAMENT OF CANADA, 5.

6. B. N. A. Act, 1867, ss. 9, 17, 56, 58, 59, 91, 92, s-s. 1—Power of appointing Queen's Counsel. iii. 575.

See LEGISLATURE, 4.

7. Right of the Crown to plead prescription—C. Code, Art. 2211—Interruption of, by petition of right. iv. 1.

See PETITION OF RIGHT, 3.

8. B. N. A. Act, 1867, ss. 91 & 92—Insurance. iv. 215.

See LEGISLATURE, 5.

9. B. N. A. Act, 1867, ss. 91, 101—Maritime Court of Ontario, power to create. iv. 648.

See MARITIME COURT OF ONTARIO, 1.

10. B. N. A. Act, 1867, s. 91, s-s. 12—31 V. c. 60—14 & 15 V. c. 63 (Imp.)—Fishery officer, action against. v. 66.

See PARLIAMENT OF CANADA, 4.

11. B. N. A. Act, 1867, ss. 91 & 92—Licenses, merchants, traders, etc. v. 356.

See LICENSE, 1.

12. B. N. A. Act, 1867, ss. 91, 92, 102 & 109—Escheat. v. 538.

See LEGISLATURE, 6.

Constitutional Law—Continued.

13. B. N. A. Act, 1867, s. 91, s-s. 12—Fisheries, regulation and protection of—Rights of riparian proprietors. vi. 52.

See PETITION OF RIGHT, 4.

14. B. N. A. Act, 1867, s. 108—Public harbour—Grant of foreshore by patent under Great Seal of Province. vi. 707.

See HARBOUR.

ESTOPPEL, 19.

xxi. 152.

15. Liability of the Crown for acts of agents—16 V. c. 235—Trustees of Quebec turnpike roads, debentures issued by—Legislative recognition of a debt. vii. 53.

See PETITION OF RIGHT, 6.

16. Non-liability of Crown for tort, negligence, or fraudulent misconduct of its servants.—vii. 216.—vii. 570.—viii. 1.—x. 335.

See PETITION OF RIGHT, 1, 10, 11, 15.

17. Liability of Crown for breach of contract—Damages. vii. 696.

See PETITION OF RIGHT, 8, 17.

18. Non-liability of Crown on executory contract—Recovery for value of work done if expenditure unauthorized by Parliament—31 V. c. 12, ss. 7, 15 & 20 (D.). vii. 634.

See PETITION OF RIGHT, 9.

19. The Crown not a common carrier. vii. 216.—viii. 1.

See PETITION OF RIGHT, 10, 11.

20. Non-liability of Crown for assessment for sidewalks. 30th April, 1886.

See PETITION OF RIGHT, 21.

21. Non-liability of Crown for taxes. 22nd June, 1885.

See ASSESSMENT OF TAXES, 12.

PARLIAMENT OF CANADA, 12.

xix. 510.

22. Lien of Crown for timber dues. 22nd June, 1883.

See PETITION OF RIGHT, 18.

Constitutional Law—Continued.

23. B. N. A. Act, 1867, ss. 65, 126 & 129, s. 91, s-s. 3, s. 92, s-s. 2—
Taxation—Filings in court. viii. 408.

See LEGISLATURE, 7.

24. B. N. A. Act, 1867, s. 91, s-s. 15—34 V. c. 5 (D.) (Banking Act),
ss. 46, 47 & 48—Warehouse receipts. viii. 512.

See WAREHOUSE RECEIPTS, 2.

25. B. N. A. Act, 1867, s. 92, s-s. 14—Power of Provincial Legisla-
ture to legislate respecting procedure and residence of
judges. 18th June, 1883.

See LEGISLATURE, 12.

26. B. N. A. Act, 1867, s. 92—Sale of liquors—Police regulations—
42 & 43 V. c. 4, s. 1 (Q.). ix. 185.

See LEGISLATURE, 10.

27. B. N. A. Act, 1867, s. 91, s-s. 12, s. 92, s-s. 13—31 V. c. 60, ss. 2,
19 (D.)—O. C., 11th June, 1879—Construction of—Fishery
officer, action against. ix. 206.

See FISHERIES, 3.

28. B. N. A. Act, 1867, s. 91—Obstructions in tidal and navigable
rivers. x. 222.

See LEGISLATURE, 8.

29. Priority of Crown as simple contract creditor—Insolvent
bank—Winding up proceedings. xi. 1.

See CROWN, 15.

30. B. N. A. Act, 1867, ss. 91, 92, s-s. 9, 129—Sale of liquors—
Licenses—41 V. c. 3 (Q.). xi. 25.

See LEGISLATURE, 13.

31. B. N. A. Act, 1867, ss. 91, 92—Liquor License Act, 1883, and
Amending Act. 12th Jan., 1885.

See LIQUOR LICENSE ACT, 1883.

32. B. N. A. Act, 1867, s. 91, s-s. 24; s. 92, s-s. 5, ss. 109, 117—
Indian lands. xiii. 577.

See INDIAN LANDS.

ASSESSMENT AND TAXES, 8.

Constitutional Law—Continued.

33. B. N. A. Act, 1867, s. 92, s-s. 5, ss. 109 & 146—Public lands—
Transfer to Dominion—Precious metals. xiv. 345.

See MINES AND MINERALS, 2.

34. B. N. A. Act, 1867, s. 92, s-s. 9, 15—Quebec License Act, 41 V.
c. 3, and amendments—43 V. c. 19 (D.)—Licensed brewers. xv. 253.

See LEGISLATURE, 14.

35. B. N. A. Act, 1867, s. 91, s-ss. 10, 13, s. 92, s-s. 16—Taxation of
ferry boats. xv. 566.

See LEGISLATURE, 15.

36. B. N. A. Act, 1867, ss. 91, 92, s-s. 14, ss. 101, 129—Conferring
jurisdiction on the court of vice-admiralty. xvi. 757.
16th Jan., 1884.

See PARLIAMENT OF CANADA, 8.

37. New Brunswick Liquor License Act, 1887, 50 V. c. 4—Validity
of—Prohibition of sale of liquor—Powers of mayor of
city—Disqualifying liquor sellers—Effect of. xvii. 44.

See LEGISLATURE, 16.

STATUTE, 8.

38. Ontario Judicature Act, 1881, s. 43, limiting appeal to Supreme
Court, declared *ultra vires*. xvii. 251.

See LEGISLATURE, 17.

39. By-law respecting sale of meat in private stalls in city of
Montreal—37 V. c. 51, s. 123, s-ss. 27 & 31 (P. Q.)—Power
of Provincial Legislature to pass—B. N. A. Act, s-s. 9 of s.
92, "Other Licenses." xvii. 495.

See LEGISLATURE, 18.

40. Insolvent bank—R. S. C. c. 120—Prerogative of Crown—
Deposit by insurance company under Insurance Act—
R. S. C. 124—Priority of note holders. xvii. 657.

See CROWN, 21.

41. 47 V. c. 84 (Q.)—By-law under—Business tax—Liquor dealer.
xviii. 594.

See JURISDICTION, 76.

Constitutional Law—Continued.**42. Winding up Act—R. S. C. c. 129, s. 3—Foreign corporations.**

S. 3 of "The Winding-up Act" (R. S. C. c. 129) which provides that the Act applies to " " " incorporated trading companies doing business in Canada wheresoever incorporated is *intra vires* of the Parliament of Canada.

Allen v. Hanson. *In re The Scottish Canadian Asbestos Company.*—xviii. 667.

43. B. N. A. Act, 1867, ss. 91 & 92—Interest—Legislative authority over—Municipal Act, Manitoba—49 V. c. 52, s. 626 (Man.)—50 V. c. 10, s. 43 (Man.)—Taxation—Penalty for non-payment of taxes—Additional rate. xix. 204.

See LEGISLATURE, 20.

44. Education—Authority to legislate with respect to—Denominational schools—53 V. c. 38 (Man.)—33 V. c. 3 (D.). xix. 374.

See LEGISLATURE, 21.

45. Incorporation of Trustees' Bank of Upper Canada—31 V. c. 17 (D.)—33 V. c. 40 (D.)—Validity of—B. N. A. Act, s. 91—Taxation of Crown lands—R. S. O. 1887, c. 193, s. 7, s-s. 1. xix. 510.

See PARLIAMENT OF CANADA, 12.

CROWN, 23.

46. B. N. A. Act, s. 125—Charter of the C. P. R. Co.—Lands of company exempt from taxation till sold or occupied. xix. 702.

See ASSESSMENT AND TAXES, 23.

47. B. N. A. Act, s. 92, s-s. 14—Jurisdiction of provincial courts—C. S. B. C. c. 25, s. 14, and 53 V. c. 8, s. 9 (B.C.) *intra vires* of Provincial Legislature—51 V. c. 47 (D.) "The Speedy Trials Act"—Meaning of "Any judge of a County Court"—Said Act not an Act conferring jurisdiction, but an exercise of the power of Parliament to regulate criminal procedure.

See LEGISLATURE, 23.

48. 51 V. c. 5 (Man.)—Validity of—Railway Act, 1888 (D.) s. 306, 307—R. S. C., c. 109, s. 121.

See LEGISLATURE, 24.

Contempt—Power of Provincial Legislature to punish for.

See LEGISLATURE, 9.

2. Constructive contempt—Practice in cases of—R. S. C. c. 135, s. 24 (a)—Final judgment—Appeal.

See JURISDICTION, 53.

3. *Contempt of court—Constructive contempt—Obstructing litigation—Prejudice to suitor—Locus standi.*

On an application to commit a solicitor for a constructive contempt of court by obstructing litigation the alleged contempt consisted in publishing in a newspaper comments on a judgment rendered by a master in chambers in a cause in which the writer was solicitor for the defendant. The motion to commit was made by the relator in such cause. Notice of appeal from said judgment had been given, but before the motion was made the notice was countermanded and the appeal abandoned.

Held, that the proceedings in the cause before the master being at an end the relator in the cause could not be prejudiced, as a suitor, by the publication complained of; and as such prejudice was the only ground on which he could institute the proceedings for contempt he had no *locus standi* and his application should not have been entertained.

In re Henry O'Brien.—xvi. 197.

See also JURISDICTION, 55.

4. *Contempt of Court—Criminal proceeding—S. & E. C. Act (R. S. C. c. 135), s. 68—Jurisdiction—Final judgment.*

Contempt of court is a criminal matter and an appeal to the Supreme Court from a judgment in proceedings therefor, cannot be brought unless it comes within s. 68 of the Supreme and Exchequer Courts Act (R. S. C. c. 135). *O'Shea v. O'Shea* (15 P. D. 59), followed. *In re O'Brien* (16 C. S. C. R. 197), referred to.

The Supreme Court of New Brunswick adjudged E. guilty of contempt but deferred sentence.

Held, that this was not a final judgment from which an appeal would lie to the Supreme Court of Canada. Appeal quashed.

Present :—Strong, C.J. and Fournier, Taschereau, Gwynne and Patterson, JJ.

Ellis v. The Queen.—20th February, 1898.

Contract—Terms of delivery—Reasonable time—Damages—Arts. 1067, 1073, 1544, C. C. (L.C.).

On the 7th May, 1874, the appellant sold to the respondent five hundred tons of hay. The writing, which was signed by the appellant alone is in the following terms: "Sold to G. A. C. five hundred tons of timothy hay of best quality, at the price of \$21 per ton f. o. b. propellers in canal, Montreal, at such times and in such quantities as the said G. A. C. shall order. The said

Contract—Continued.

hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot by order or draft on self, at Bank of Montreal, the same to be consigned to order of Dominion Bank, Toronto."

In execution of this contract, the appellant delivered one hundred and forty-seven tons and thirty-three pounds of hay, after which the respondent refused to receive any more. The appellant having several times notified the respondent, both verbally and in writing, by formal protest on the 28th July, 1874, requested him to take delivery of the remaining three hundred and fifty-four tons of hay.

On the 11th November following, the appellant brought an action of damages for breach of contract, by which he claimed \$3,417.77, to wit, \$2,471. difference between the actual value of the hay at the date of the protest and the contract price, and \$948.77 for extra expenses which the appellant incurred, owing to the refusal of the respondent to fulfil his contract.

Held, that such a contract was to be executed within a reasonable time and that, from the evidence of the usages of trade, the delivery, under the circumstances, was to be made before the new crop of hay, and that the respondent, being in default to receive the hay when required, was bound to pay the damages which the appellant had sustained, to wit, the difference at the place of delivery between the value when the acceptance was refused and the contract, and other necessary expenses, the amount of which, being a matter of evidence, is properly within the province of the court below to determine.

Chapman v. Larin.—iv. 349.

2. *Construction of—Accord and satisfaction.*

Appellant, part owner of a vessel, brought an action against respondents, merchants and ship-brokers in England, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent.

On the trial it appeared that E. V., a brother of respondents, had obtained from appellant a fourth share in the vessel, the purchase being effected by one of the respondents; and it was also shown that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at Liverpool, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to Liverpool, of which appellant disapproved. Appellant wrote to respondents, complaining of their conduct and protesting against the expense incurred. They replied, that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the Atlantic. A correspondence ensued, and finally, on the 17th November, 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it

Contract—Continued.

was not their fault. He then reasserted his right to control the vessel, stated, in detail, his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for \$4,200 in cash." This amount was about the same price for the share as appellant had sold it for some years before. Respondents accepted the offer, and the transfer was made to appellant.

Held, on appeal, reversing the judgment of the Supreme Court of New Brunswick, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction.

The contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name.

Taschereau and Gwynne, JJ., dissenting.

Weldon v. Vaughan.—v. 85.

3. To take shares.

See CORPORATIONS, 9.

4. *Negligence of contractor—41 V. c. 6 & 7 (N.B.)—By-law of city of St. John—Building erected in violation of—Negligence of contractor—Liability of Employer—Several defendants appearing by same attorney—Separate counsel at trial—Cross-appeal—Rent, loss of—Damages.*

On the 26th September, 1877, S. contracted to erect a proper and legal building for W. on his (W.'s) land, in the city of St. John. Two days after, a by-law of the city of St. John, under the Act of the Legislature, 41 V. c. 6, "The St. John Building Act, 1877," was passed, prohibiting the erection of buildings such as the one contracted for, and declaring them to be nuisances. By his contract, W. reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail or execution of the work without avoiding the contract, etc., etc. By the contract it was also declared that W. had engaged B. as superintendent of the erection—his duty being to enforce the conditions of the contract, furnish drawings, etc., make estimates of the amount due, and issue certificate. While W.'s building was in course of erection, the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to W. and McM., his neighbour.

On an action by McM. against W. and S. to recover damages for the injury thus sustained, the jury found a verdict for the plaintiff for general damages, \$3,952, and \$1,875 for loss of rent. This latter amount was found separately, in order that the court might reduce it, if not recoverable.

On motion to the Supreme Court of New Brunswick for a non-suit or new trial, the verdict was allowed to stand for \$3,952, the amount of the general damages found by the jury.

Contract—Continued.

On appeal to the Supreme Court and cross-appeal by respondents to have verdict stand for the full amount awarded by the jury, **Held**, Gwynne, J., dissenting, that at the time of the injury complained of, the contract for the erection of W.'s building being in contravention of the provisions of a valid by-law of the city of St. John, the defendant W., his contractors and his agent (S.) were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to McM. charged in the declaration. That the jury, in the absence of any evidence to the contrary, could adopt the actual loss of rent as a fair criterion by which to establish the actual amount of the damage sustained, and therefore the verdict should stand for the full amount claimed and awarded.

Per Gwynne, J., dissenting: That W. was not, by the terms of the contract, liable for the injury, and, even if the by-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it.

The defendants appeared by the same attorney, pleaded jointly by the same attorney, and their defence was, in substance, precisely the same, but they were represented at the trial by separate counsel. On examination of plaintiff's witness, both counsel claimed the right to cross-examine the witness.

Held, affirming the ruling of the judge at the trial, that the judge was right in allowing only one counsel to cross-examine the witness.

Walker v. McMillan.—vi. 241.

5. *Sale of goods—Payment—Appropriation—Non-suit.*

The Albert Mining Company (respondent) brought this action to recover for coal sold and delivered to appellants during the years 1866, 1867 and 1868. S. and M. and McG. were partners carrying on business under the name of the Albertine Oil Company, the defendant S. furnishing the capital. The contract for the coal was made by S. who was a large stockholder in the plaintiff company and entitled to yearly dividends on his stock. The agreement, as proved by plaintiffs, was that S. purchased the coal for the Albertine Oil Company, the members of which he named, that the president of the plaintiff company told S. they would look to him for payment, as the other partners were poor; that the terms of sale were cash on delivery on board the vessels; and that S. agreed that the dividends payable to him on his stock should be applied in payment for the coal; that in consequence of this arrangement the plaintiffs credited the Albertine Oil Company with the amount of S.'s dividends as they were declared from time to time down to August, 1860, leaving a balance of \$912 due to S. It also appeared that the coal delivered was charged in the plaintiffs' books to the Albertine Oil Company, and that the bills of lading on the shipments of the coal were also made out in their name and that some time afterwards a notice signed by S. and M. was given to the plaintiffs, complaining of the inferior quality of the coal, and claiming damages in consequence. In the latter part of the year 1868, S. repudiated the agreement to appropriate his dividends to the payment of coal, and refused to sign the receipts therefor in the plaintiffs' books. He had signed the receipt for the dividend of 1836.

Contract—Continued.

The present action was then brought (in 1873) against S. and M., the surviving partners of the Albertine Oil Company, McG. having died, to recover the value of the coal. S. shortly afterwards brought an action against the plaintiffs for the dividends; the claim was referred to arbitration, and an award was made in favour of S. for upwards of \$15,000, which the plaintiffs paid in July, 1874. The receipt given for the payment stated that it was in full satisfaction of the judgment in the suit of S. against the Albert Mining Company, and it appeared (though evidence of this was objected to in the present action) that it included the dividends for the years 1867 and 1868.

The learned judge, before whom the action was tried, nonsuited the plaintiffs, but the Supreme Court of Nova Scotia set aside the non-suit.

Held, reversing the judgment of the court below, Strong, J., dissenting, that there being clear evidence of the appropriation of S.'s dividends in pursuance of agreement made with him, and therefore of the plaintiffs having been paid for the coal in the manner and on the terms agreed on, the plaintiffs were properly non-suited.

Spurr v. The Albert Mining Co.—ix. 35.

6. Contract—Breach of—Master and owner—Damages, measure of.

This action was brought by G. against A. F. S. S. Co. to recover damages for an alleged breach of contract. The plaintiff was master of the ss. "George Shattuck," trading between Halifax and St. Pierre and other ports in the Dominion. She was owned by the defendant company, the plaintiff being one of the largest shareholders of the company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for \$900 a month, afterwards increased to \$950. The ship had been originally accustomed to remain at St. Pierre forty-eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company. The case was tried before Sir William Young, C.J., without a jury, who, considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict in his favour for \$2,000. A rule *nisi* was made absolute by the full court for a new trial.

On appeal to the Supreme Court of Canada, it was **Held**, 1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on this ground. 2nd. *Per* Ritchie, C.J., and Fournier and Gwynne, JJ., that the fact of the master being a shareholder in the corporation owning the vessel, had no bearing on the case, and that it was proper to grant a new trial to have the question as to whether the plaintiff so acted as to justify his dismissal by the owners submitted to a jury, or a judge, if case be tried without a jury.

Gullford v. Anglo-French S.S. Company. —ix. 303.

Contract—Continued.**7. Of towage.**

See SHIPS AND SHIPPING, 5.

8. Condition precedent—Direction to jury—Implied promise, when part performance.

In April, 1872, the defendant Morrow, gave the plaintiffs, Waterous, *et al.*, an order by letter for certain mill machinery, which the plaintiffs were to put in complete operation to the defendant's satisfaction in a building to be provided by the defendant. All the machinery, with the exception of a slab saw, was supplied, and the mill was put in operation in the summer of 1872. The defendant found fault with the machinery, and after alterations and repairs made by the plaintiffs in 1873, the defendant put additional machinery into the mill and worked it until 1875, when it was destroyed by fire. The defendant had insured the whole machinery, including that supplied by the plaintiffs, for \$7,700, the additional machinery put in by himself being valued at \$2,500. The defendant received the benefit of the insurance to the full amount of the loss. The contract price was \$4,250, together with freight and expenses, making in all \$4,790. Some payments were made, but the defendant refusing to pay a balance of \$1,900, the plaintiffs brought an action of assumpsit, adding the common counts.

At the close of the plaintiffs' case a non-suit was moved for on the ground that it was a condition precedent to the defendant's liability accruing that the work should be done to his satisfaction, and it was contended that the plaintiffs' own evidence showed that the defendant never was satisfied, but that he was complaining all along. This point being over-ruled, the defendant undertook to show that the machinery was not what was represented, but defective and in many parts had to be repaired, and that he had already paid as much as it was worth. Much evidence was given on this issue, and the plaintiffs endeavoured to show that any defect in the working of the mill was attributable to the shifting of the foundation erected by the defendant himself, and to the want of skill of the men employed by him. The learned judge left it to the jury to say whether the machinery was reasonably fit and proper for the purpose for which it was intended, and if not, directed them that the defendant was only bound to pay as much as it was worth. The jury returned a verdict for the plaintiffs for \$1,850, having deducted \$200 for the defects and \$80 for that part of the machinery not supplied.

A rule *nisi* to set aside the verdict and grant a new trial was made absolute by the Supreme Court of New Brunswick (2 Pugs. & Bur. 11) on the ground that the learned judge should have directed the jury that "the length of time that the defendant used the machinery, the complaints he made about it from time to time, and all the circumstances connected with it, should have been left to the jury, with a direction for them to consider whether from the defendant's dealings with it they could infer a new implied contract on his part to keep the machinery and pay what it was worth, though less than the contract price."

Contract—Continued.

On appeal to the Supreme Court of Canada, **Held**, That in suing upon this contract it was not necessary for the plaintiffs to have averred, as a condition precedent to their right to recover, that the work, besides having been skilfully, properly, sufficiently and in a workmanlike manner executed, was completed to the satisfaction of the defendant.

In cases in which something has been done under a special contract, but not in strict accordance with the terms of the contract, although the party cannot recover the remuneration stipulated for in the contract because he has not done that which was to be the consideration for it, still, if the other party has derived any benefit from the work done, as it would be unjust to allow him to retain that without paying for it, the law implies a promise upon his part to pay such a remuneration as the benefit conferred upon him is reasonably worth. The jury in this case having decided upon the evidence that the defendant had derived a greater benefit from the work done than was compensated by the amount he had already paid, the plaintiffs were entitled to retain the benefit of the verdict, and the rule granting a new trial should be discharged with costs.

Appeal allowed with costs.

Waterous v. Morrow.—12th Dec. 1879.

9. *Contract—Certificate of Engineer, whether a progress Estimate or final Estimate.*

Boomer & Son were contractors to build for McGreevy the superstructure of the bridges on the North Shore Railway between Quebec and Three Rivers. By the agreement the defendant McGreevy reserved the right to himself to substitute iron for the wooden superstructures of any of the bridges, and by notice to the plaintiffs to terminate the contract at any time in regard thereto, he to pay the plaintiffs for the work done and materials provided up to the time of giving such notice, "on production of the certificate of the engineer of the said" defendant "establishing amount due." The defendant acted on this provision of the contract with respect to three of the bridges, by notice dated 2nd October, 1875, and Charles Odell, the defendant's engineer, reported and certified under date of the same day \$14,872.13 to be due, including \$4,100 for iron-work for two turn-tables purchased by plaintiffs for the work, and deducting a payment on account by a note for \$8,000. The engineer made another estimate, apparently in amendment of his previous one, dated the same day, establishing the amount at \$22,131.93, without reference to the amount of the note for \$8,000.

The defendant contended that the estimates of the engineer did not establish correctly either the amount of work done or value of materials, but were merely progress estimates to enable work to progress generally under the contract, until a final examination and acceptance of the works, and that, as a matter of fact, the plaintiffs had been fully paid all they were entitled to.

The Superior Court for Lower Canada, Caron, J., awarded Boomer & Son \$15,042.44, deducting the turn-tables. This judgment the Court of Queen's Bench affirmed with the exception of a further deduction of \$2,006.03 for which there appeared to have been no estimate given.

Contract—Continued.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that the proper conclusion from the evidence was, that the certificate in question was delivered to the plaintiffs as a final estimate, intending to represent as correct the debt of the defendant to the plaintiffs for amount due on materials prepared for the bridges, upon which work was stopped by defendant.

Appeal dismissed with costs.

McGreery v. Boomer—10th June, 1880.

10. *Contract to sell on commission, breach of—Damages—Evidence from defendant's own books—Supplemental demand—Settlement of accounts, not final—Prescription, interruption of—C. C. P. Art. 345, 346—Technical objection not taken in court below—Rule of Privy Council.*

By written contract of the 23rd January, 1868, the plaintiff contracted with the defendants to sell their goods in the Maritime Provinces, the engagement to continue for a period of five years, subject to co-partnership or business changes. By the contract he was to have 5 per cent. commission on all goods of defendants' manufacture and 2½ per cent. on all other goods. This commission was to be paid to him on all sales, no matter whether such sales had been effected by him or had been made direct to purchasers by defendants without his knowledge or intervention. The plaintiff was opening up an entirely new market for defendants' goods.

The plaintiff entered upon his duties under the contract, and in two years succeeded in establishing a trade for defendants. On the 5th December, 1870, the defendants terminated the engagement, alleging that they did so in consequence of the interruption to their business by the late fire and some changes they expected to make in their business firm the ensuing year.

The plaintiff objected to his agency being terminated, and at the expiration of the five years brought this action to recover a balance of \$1,000 for unpaid commissions due, and \$10,000 damages for breach of contract.

On going to proof plaintiff examined defendant Ames, who produced from defendants' ledgers a full statement of sales effected by defendants in Maritime Provinces up to the 5th December, 1870. Thereupon plaintiff made a supplemental demand, claiming \$1,289.50 additional for unpaid commissions.

The Superior Court for Lower Canada by its judgment rejected plaintiff's claim for damages on the ground that co-partnership and business changes took place in December, 1870, in defendant's firm, and that this by the terms of the contract entitled them to terminate it as they did. As to the plaintiff's claim for unpaid commissions for the period up to the 5th December, 1870, the court held the same to be a good open existing demand, and referred the accounts to an accountant, who found \$1,705.78 due to plaintiff for commissions. This report the same court by its final judgment adopted, and condemned defendants in the above sum of \$1,705.78 and interest from service of process and costs.

Contract—Continued.

The Court of Queen's Bench reversed the judgment of the Superior Court and dismissed appellant's action, on the ground that it was proved that after each trip made by plaintiff, accounts were settled for commission due to satisfaction of plaintiff, and that there was a settlement on the 29th December, 1869, when engagement terminated, and that the evidence produced by defendants showed that plaintiff was fully paid for all commissions earned.

On appeal to the Supreme Court of Canada, Held, that nothing had occurred at the settlement of commission, from time to time paid by the defendants to the plaintiff upon the sales as the defendants themselves, who alone had a perfect knowledge of them, represented them to be, which would disentitle the plaintiff to have an account taken of all the sales upon which he was by his contract entitled to commission at least up to 5th December, 1870. The plaintiff was not aware of the large sales which had been made by defendants, and there could be no binding acquiescence when the plaintiff was not aware of his rights. That the result of the account taken by the accountant appointed by the Superior Court could not be objected to, and therefore the judgment of the Superior Court should be affirmed.

Per Taschereau, J.—The prescription, if any, was interrupted by a letter written by defendants to plaintiff before it accrued, and *Walker v. Sweet* (21 L. C. Jur. 21) must be followed as long as it stands unreversed. The objection, that the report was not duly received in evidence in the case, according to Articles 845 and 846 C. C. P., had not been taken in the court below, and the rule in the Privy Council, that a purely technical objection not made in the court below cannot be entertained in appeal, must be followed.

Appeal allowed with costs.

Fuller v. Ames.—10th June, 1880.

11. Under Statute of Frauds—As to whether mem. in writing contained terms of—Question for Jury.

See SALE OF GOODS, 10.

12. *Contract sous seing privé*—Interrogatories on articulated facts—Evasive answers taken as affirmative—C. C. P. Arts, 228, 229.

The plaintiff alleged that he made for defendant, for the use of the Quebec, Montreal, Ottawa & Occidental Railway, 50,980 railway ties, according to the stipulations of a contract *sous seing privé* (by private writing) entered into between defendant, acting by Robert McGreevy, his brother, agent and mandatory on one part, and one Joseph Lavallée, and one Frs. L. Duhaime on the other part, the said Lavallée & Duhaime having, shortly after, made over to said plaintiff all their rights, claims and interests in the said contract, together with one horse, for fifty dollars. That of the above stated quantity of railway ties, 33,900 were delivered by plaintiff to defendant

Contract—Continued.

on the line of the said railway, and 17,080 were delivered on launching places on river banks (*jetées*) and that the said ties were of the price and value stipulated in the said contract. Plaintiff further alleged that he made for defendant, and delivered to him 2,822 cull ties, for which the defendant promised to pay him eight dollars per hundred and which were worth that price. Lastly he alleged having paid for defendant, for the rent of a piece of ground, forty dollars, making in all, according to the price stipulated in the said contract and the value of the said ties, \$6,855.89. He gave credit to defendant for \$3,765, leaving due him a balance of \$3,090.89, which he claimed. Plaintiff claimed a further sum of \$1,000 for damages.

Defendant met the whole claim by a general denial, and alleged that the said contract was never entered into by himself, but was entered into by the said Robert McGreevy, his brother, in his personal name and capacity, that said plaintiff did not fulfil his said contract nor make the said ties as stipulated in the said contract, and that the amount which he received was sufficient to pay for the ties so made.

To interrogatories on articulated facts put to the defendant he answered, with one or two exceptions: "I do not know." The Superior Court at Three Rivers held that these answers were evasive and insufficient, and must therefore be declared to be true and proved, and on these and on the evidence adduced gave judgment and condemned the defendant to pay to the plaintiff \$3,090.89 for the balance due on the price and value of said ties, dismissing the plaintiffs claim for damages.

On appeal to the Court of Queen's Bench this judgment was unanimously confirmed.

On appeal to the Supreme Court of Canada Held, that the defendant did not answer the interrogatories put to him, which referred to the matters in issue, in a categorical, explicit and precise manner as he was bound to do by law (C. C. P. Arts. 228, 229). If he had no personal knowledge he should have obtained the information from his general agent, clerks and others acting for him in executing the contract. These interrogatories, therefore, were properly taken as affirmatively answered and proved the plaintiff's case. Appeal dismissed with costs.

McGreevy v. Paille.—12th February, 1881.

See CONTRACT, 17.

13. Sale of goods not specified—Intention to pass property—Appropriation.

See SALE OF GOODS, 11.

14. Contract to cut lumber—Vesting of property—Writ of replevin—Sheriff's possession under—Trespass—Pleading—Jus tertii—Justification by Sheriff under writ—Amendment, power of by Supreme Court of Canada.

In November, 1874, one Arbo entered into a written agreement with one Muirhead to get logs off land under Muirhead's control, the logs to be Muir-

Contract—Continued.

head's property as out. In December following one Maroonney agreed with Arbo to cut and haul logs for him from land specified in the agreement between Arbo and Muirhead, which logs were to be Arbo's property at the landing, Arbo agreeing to furnish Maroonney with supplies to get the logs; Maroonney cut logs under this agreement and hauled them to the landing. In November, 1875, the logs not having been driven and Arbo not having furnished sufficient supplies, he and Maroonney rescinded their agreement, Maroonney giving his note to Arbo for the supplies delivered. The logs remained on the landing, and in February, 1876, they were seized as the property of Arbo, who had become insolvent, under a writ of attachment, issued under the Insolvency Act of 1875. In May, 1876, Maroonney sold the logs to the plaintiff, who drove them to the boom of the S. W. Miramichi, where they were replevied by the assignee of Arbo's estate. The plaintiff put in a claim of property in them, and the sheriff returned the writ of replevin, with such claim, to the attorney who issued the writ. No writ *de prop. prob.* having been issued, the sheriff kept possession of the logs, and the plaintiff brought trespass against him for taking them.

The plaintiff pleaded: 1. Not guilty; 2. Goods not the plaintiff's; 3. Goods the goods of the assignee of Arbo, and defendant did acts complained of by license of such assignee; 4. Goods the goods of Muirhead, and defendant did acts complained of by license of Muirhead; 5. Goods property of defendant.

A verdict was entered for plaintiff by consent for \$1,554, the value of all the logs, subject to be reduced to \$420.47, the value of logs not cut by Maroonney, if the court should be of opinion that plaintiff not entitled to Maroonney logs.

The Supreme Court of New Brunswick reduced the verdict to the said sum of \$420.47. *See 4 Pugs. & Bur. 25.*

On appeal to the Supreme Court of Canada, **Held,**

Per Ritchie, C.J.—That the judgment appealed from should be affirmed on the following ground: It having been proved on the trial, without objection, and made part of the case, that the logs in question were seized by the defendant, as sheriff, under a writ of replevin issued out of the Supreme Court of New Brunswick, directing him to take the logs in question, the sheriff was justified in taking the logs thereunder, and that as against the plaintiff it was no wrongful taking or conversion. That this defence could be given in evidence under the pleadings in the cause, or, if it could not be so given, this being a strictly technical objection, and this defence having been put forward on the trial without objection, and no such technical point reserved on the trial, if necessary, the record should be amended.

Per Strong and Gwynne, JJ.—The parties at the trial having rested their rights upon the question of title, viz.: were the logs the property of the plaintiff, or were they the property of Ellis, as assignee of Arbo, or of Muirhead, and the plaintiff claiming title through Maroonney, it was necessary for him to show title in Maroonney, which he had failed to do, and therefore he could not recover for the Maroonney logs.

Contract—Continued.

Per Fournier and Henry, JJ.—The logs when taken were the property of the plaintiff, and he was therefore entitled to judgment on all the issues raised.

Per Fournier, J.—The defendant might have justified under the writ, and the court might grant leave to add such a plea, but in that event the costs should be paid by defendant.

Per Henry, J.—No effort having been made in the court below to add such a plea it was too late and contrary to precedent and justice now to admit it.

Per Gwynne, J.—When the plaintiff fails to show in evidence that he was in actual possession at the time of the taking, and is therefore driven to rest on the goodness of his title to the property, a defendant may, in rebuttal of the evidence of such title, set up a bare *jus tertii* without showing he had any authority from the third person having such title. So a sheriff sued for taking the goods of the plaintiff may show, under this issue, that the goods belonged to a third party against whom he took them in execution. The several matters therefore alleged in the 3rd, 4th and 5th pleas were matters which could have been given in evidence under the issue joined upon the 2nd plea. As to the 5th plea, in view of the evidence it was quite inappropriate to such evidence, for the writ of replevin placed in the hands of the defendant as sheriff to be executed did not vest in the defendant any property in the goods, the taking of which was complained of, so as to enable him to justify the taking as his own property as is done in the 5th plea.

Appeal dismissed with costs.

Swim v. Sheriff.—10th June, 1881.

15. Partnership between Contractors—Nature of contract.

See PARTNERSHIP, 8.

16. For carriage of Steel Rails—Representation by Agent of Crown.

See PETITION OF RIGHT, 17.

17. Contract for extra work—Decision of Engineer as to price binding—Interrogatories on *faits et articles*, when to be taken *pro confessis*—Art. 229 C. C. P.—Motion for, necessary.

An action for \$37,000 which the respondents claimed were due them for balance on a sum of \$103,213.96, amount of work performed under contract between appellant and respondents, and extra work agreed to between respondents and appellant.

On appeal to the Supreme Court of Canada from the Court of Queen's Bench for Lower Canada, **Held**, Taschereau, J., delivering the judgment of the court, 1. The contention on the part of the respondents that the *faits et articles* submitted to the appellant should be taken *pro confessis*, because the answers thereto were not direct, categorical and precise (Art. 229 C. C. P.) was not open to the respondents, as they had failed to make a motion to that effect in the

Contract—Continued.

court of first instance. The case of *McGreevy v. Paillé*, 5 Leg. News 95, confirmed by Supreme Court, was not in point as a motion had been regularly made and granted in the Superior Court. Nor has *Douglas v. Ritchie*, 18 L. C. Jur. 274, any application. There the defendant made default and had not answered the *faits et articles* at all. Here the defendant had answered, and if plaintiffs desired to have the answers set aside, it must be by motion.

2. The appellant was entitled to reversal of the judgment of the Queen's Bench as to an item of \$1,882.15, which appeared to have been allowed by oversight.

3. The sum of \$3,765.20 added by the Court of Queen's Bench, to amount granted by the Superior Court should also be deducted from the judgment, the difference between 20 and 24 cts. per yard for earth work done in 1878, there being sufficient evidence to establish that the engineer, who by a clause of the contract, was to fix the prices of all extra work, and whose decision the parties were bound to submit to, had fixed the price of such work at 20 cts.

Appeal allowed with costs and judgment of the court below varied.

McGreevy v. McCarron.—18th June, 1883.

See CONTRACT, 12.

18. Not complete or binding.

See SALE OF GOODS, 18.

19. Rescission of, on ground of fraud and false representations.

See SALE OF LANDS, 8.

20. *Building contract—Enforcement of—Violation of city by-law—Liability of owner—Effect of by-law passed after contract made.*

S. & Co., contractors for the erection of a building for the respondent in the city of St. John, N. B., brought an action, claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of the by-law of the city passed, under authority of an Act of the General Assembly of New Brunswick, (41 V. c. 7), two days after the contract was signed.

On the trial of the action the plaintiffs were non-suited, and an application to the Supreme Court of New Brunswick to set such non-suit aside was refused.

On appeal to the Supreme Court of Canada, Held, Henry, J., dissenting, that the by-law of the said city of St. John made the said contract illegal, and, therefore, the plaintiffs could not recover. *Walker v. McMillan*, 6 Can. S. C. R. 241, see Contract, 4, followed.

Contract—Continued.

Per Henry, J.—That the creation of the building would not, so far as the evidence showed, be a violation of the by-law, and therefore the non-suit should be set aside and a new trial ordered.

Spears v. Walker—xi. 113.

21. Action for breach of contract to supply meat—Steward's decision binding on the parties—Forfeiture of deposit—Damages.

Action of damages for breach of the following contract :

" 26th April, 1880."

" Tender for supplying the Windsor Hotel, Montreal, with meat, etc., from 1st May to 1st November, 1880.

" We the undersigned do hereby agree to supply the Windsor Hotel Montreal, with joints, &c., of meat, at the prices quoted, viz.: (here follows a description of the articles to be supplied and the prices.)

" The quantity and quality of the foregoing supplies to be satisfactory to the steward of the hotel, and two hundred dollars (\$200) are now handed the Windsor Hotel Syndicate as security for the due fulfilment of the contract, to be forfeited in case of non-performance, and if at any time the hotel steward is obliged to procure supplies elsewhere through any cause or negligence of ours, any excess of cost then paid over the prices of this contract shall be chargeable against the deposit of two hundred dollars. The said deposit shall not bear interest.

" This contract may be cancelled by the Windsor Hotel Syndicate at any time should they lease or sell the hotel, or should the hotel from any cause be closed before 1st November next.

" Should this contract be satisfactorily fulfilled the deposit of two hundred dollars, or any balance of the same remaining in accordance with foregoing terms, shall be returnable on demand to us.

" All accounts to be paid weekly.

(Signed) " BROWN BROS.

" The foregoing tender and contract accepted.

(Signed) " WINDSOR HOTEL SYNDICATE,

" by GEORGE ILES,

" Secretary House Managing Committee.

" Montreal, April 30th, 1880."

Plaintiff supplied meat until the 30th of June. The steward of the hotel was dissatisfied and repeatedly notified the plaintiff of his dissatisfaction, but did not immediately stop receiving meat. The supplies continuing unsatisfactory to the steward, and in his opinion not according to the contract, he so decided and reported his decision, and the contract was cancelled whereby the deposit became forfeited. The defendants had been obliged to expend \$168 more than the deposit in obtaining meat elsewhere.

On appeal to the Supreme Court of Canada, *Held*, affirming the judgment of the Court of Queen's Bench for Lower Canada, that the parties

Contract—Continued.

having agreed to make the steward the sole judge and to abide by his decision, the plaintiff was bound by it. Further, the evidence showed that the steward's dissatisfaction was justified by the inferiority of the meat supplied, and that there was no *mala fides* on his part, but that he had acted *bona fide* under a reasonable sense of dissatisfaction.

Appeal dismissed with costs (Fournier and Henry, JJ., dissenting).

Brown v. Allan—28rd June, 1884.

22. Completed by letters—Statute of frauds.

See SALE OF LANDS, 10.

23. Contract to saw lumber—Rescission of—Finding of Jury—Right to recover on common counts for work done.

The plaintiff was employed by the defendant under a written agreement, not under seal, to saw lumber in the defendant's mill, of which, under the agreement, plaintiff had possession and charge.

It was contended on behalf of the plaintiff at the trial that this agreement was rescinded, and that the plaintiff was entitled to recover on the common counts, for the work actually done up to the time of the alleged rescission.

The jury found in favour of the plaintiff upon the facts bearing upon the alleged rescission, and the Supreme Court of Nova Scotia refused a rule *nisi* for a new trial, Rigby, J., delivered the judgment of the court. (See 5 Russell & Geldert 381).

It was contended on behalf of the plaintiff that the judgment appealed from was correct, because there was sufficient evidence to warrant the jury in finding that the agreement in question had been rescinded, and that the defendant agreed to pay the plaintiff for the work done by the latter up to the time of the said rescission.

On appeal to the Supreme Court of Canada, Held, that for the reasons given by Rigby, J., in the court below the judgment should be affirmed (Ritchie, C.J., and Strong, J., dissenting).

Appeal dismissed with costs.

Young v. Tracey.—17th Feby., 1885.

24. Tender for contract by firm—Assignment of interest in tender to third person—Alteration of—Specification after tender and before acceptance—Provision inserted against assignment—Incomplete contract—No locus standi in individual member of firm to bring action.

On the 1st of February, 1880, the corporation of the village of St. Gabriel published a notice calling for tenders for certain waterworks required for the village, according to plan and specification.

Contract—Continued.

C. St. James & Co. tendered "to do the several works of supplying and laying water pipes in this village according to plan and specification," for the sum of \$87,600.99.

The specification did not contain any prohibition against transferring or making over, in whole or in part, the contract for said works.

The tender of C. St. James & Co., when the tenders were opened, which was on the 2nd March, 1880, was found to be the lowest but one, that of E. Dubuc & Co. By a memo. of agreement, made on the 5th of March, 1880, between C. St. James and Alexander Chisholm, doing business together under the name of C. St. James & Co., of the first part, and one Charles E. Torrance, of the second part, the parties of the first part transferred all their interest in or to and by virtue of the tender to the party of the second part, for \$500 a further sum of \$500 to be paid by the party of the second part when contract should be awarded by by-law duly passed.

Dubuc & Co. having availed themselves of certain irregularities to withdraw their tender, the St. Gabriel council decided to make some changes in the plans and specifications, and at a meeting held on the 12th July, 1880, resolved that the specification as made by the engineer of the corporation, with the corrections as amended by the council, be accepted and adopted, and that Mr. Casimir St. James should be allowed two days to consider the specification, and if he should accept that he should attend on the 15th at 3 p.m. to sign the contract.

The new specification to which reference was made in the resolutions contained among other clauses the following: "The contractor will not be permitted to sub-let any portion of the work, except for the delivery of materials, without the consent of the Municipal Council."

In the afternoon of the 15th July, Casimir St. James and Alexander Chisholm went to the office of the respondent's notary for the purpose of signing the contract referred to in the resolutions. At the same time Mr. Torrance presented himself, and claimed the right to sign the contract in question, as being the transferee of the two individuals above referred to producing and communicating to the Mayor, who was present, the document hereinbefore referred to, by which C. St. James & Co. had transferred to him all their interest in the contract in question.

The Mayor thereupon requested delay until the evening to consult the council, which was to meet in accordance with the terms of the adjournment on the 12th July.

At the council meeting which was held the same evening, the Mayor made a report of the respective pretensions of St. James and Chisholm and Mr. Torrance. St. James was called upon by the members of the council to state whether Mr. Torrance's pretensions were founded, and whether it was true that that gentleman was the transferee of C. St. James & Co.'s interests under the tender which they had submitted. The result was that the council determined not to give the contract to C. St. James & Co., but sent for the next lowest tenderers, to whom they made an offer on the terms and conditions proposed to St. James & Co. at the meeting of the 12th July, and this offer

Contract—Continued.

having been accepted it was resolved to give such next lowest tenderers the contract, and the contract with them was signed the next day.

St. James, in his own name, and pretending to be the only person interested in the tender of C. St. James & Co., then instituted an action in damages for breach of the contract which he pretended was entered into between himself and respondent under the resolutions of 12th July, 1880.

The Superior Court for Lower Canada (Chagnon, J.) dismissed the plaintiff's action, holding that the evidence showed no individual tender by St. James, but one by St. James and Chisholm, as constituting the firm of C. St. James & Co., that therefore the plaintiff had no *locus standi* to maintain the action in his own name; that, besides, under the circumstances there never had been any completed contract between the parties; the provision against assigning the contract was a material stipulation which had been violated by the assignment to Mr. Torrance, and that the council had been justified in refusing to accept the tender.

This judgment was reversed by the Court of Review at Montreal, but was restored by the judgment of the Court of Queen's Bench for Lower Canada (appeal side).

On appeal to the Supreme Court of Canada, Held, Henry, J., dissenting, that the judgments of the Superior Court and the Court of Queen's Bench should be affirmed.

Appeal dismissed with costs.

St. James v. The Corporation of St. Gabriel.—12th May, 1885.

25. Suit for rescission of—Fraud—Evidence.

See *SALE OF LANDS*, 14.

26. *Hiring and service—Clerk—Money paid out—Prescription.*

R. brought action against Y. and others, the heirs of D. D. Y., for services done as clerk to the executor of D. D. Y.'s will, in administering the estate and for money paid and laid out for estate.

Pleas: That all demands for salary were prescribed, by two years under C. C. of L. C. Art. 2261, and all sums advanced to estate and paid for and on account of it by five years under C. C. Art. 2260, par. 6. 2. That the executor, who received \$400 p. a. under the will had no right to employ a clerk at expense of estate to do the work thereof, and R.'s work was done for executor, against whom alone he had a claim.

Held, by Superior Court for Lower Canada, that the only prescription for yearly salary was that of 5 years, under Art. 2260, s. 6, while that of 30 years alone was applicable to claim for moneys laid out for estate. That the general powers of an executor include the engagement of clerks to keep the books of the estate and to carry on its affairs (C. C. 914); and \$1,754 was awarded to R.

In appeal the holdings of the Superior Court upon the several questions of law were affirmed, but the action was dismissed (Tessier and Cross JJ.,

Contract—Continued.

dissenting), on the ground that there was evidence that R. had agreed to accept \$400 p. a. and had been paid that sum.

On appeal to the Supreme Court, **Held**, that the judgment of the Court of Queen's Bench for L. C. should be reversed, and that of the Superior Court varied by increasing the amount awarded R. to \$5,607.

Rattray v. Young.—16th November, 1885.

27. *Petition of Right—Intercolonial Railway contract—31 V. c. 13, s. 18—Certificate of engineer a condition precedent to recover money for extra work—Forfeiture and penalty clauses.*

The suppliants agreed, by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 V. c. 13) to build, construct and complete sections three and six of the railway for a lump sum for section three of \$462,444, and for section six of \$456,946.48. The contract provided, *inter alia*, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions or by-laws, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, "An Act respecting the Construction of the Intercolonial Railway," or in the commissioners or engineers by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the contract relating to alteration in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of 31 V. c. 13, that the works embraced in the contracts should be fully and entirely complete in every particular and given up under final certificates and to the satisfaction of the engineers, on the 1st of July, 1871 (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, &c., to money due or percentage agreed to be retained, and to pay as liquidated damages \$2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving seven clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense; in such case the contractors were to forfeit all right to money due on the works and to the percentage returned. The work was taken out of the hands of the contractors for not having been satisfactorily proceeded with.

Held, affirming the judgment of the Exchequer Court on a petition of right filed by contractors, Fournier and Henry, JJ., dissenting, 1st. That by their

Contract—Continued.

contracts the suppliants had waived all claim for payment of extra work. 2nd. That the contractors not having previously obtained, or been entitled to, a certificate from the chief engineer, as provided by 81 V. c. 18, s. 18, for or on account of the money which they claimed, the petition of the suppliants was properly dismissed. 3rd. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors and charge them with the extra cost of completing the same, but that in making up that amount the court below should have deducted the amount awarded for the value of the plant and materials taken over from the contractors by the commissioners.

Barlinguet v. The Queen.—xiii. 26.

28. *Railway contract—Certificate of engineer—Necessity for—Laches.*

McC. et al., appellants, entered into a contract with MoG., respondent, the contractor for the construction of the North Shore Railway between Montreal and Quebec, to do and perform certain works of construction on a portion of the road, and by a clause in his contract agreed "to keep open at certain times and hours at his own cost and expense the main line for the passage of traffic or express trains run by MoG. without any charge to the latter;" but there was a proviso that "any time occupied on the road over and above what may be required by the hours hereinbefore mentioned, or any expense caused thereby shall be paid by the contractor MoG., on a certificate to that effect signed by the superintendent of the contractor."

On an action brought by appellants against respondent for damages caused by the interruption of the work on said road by the passing of respondent's trains,

Held, affirming the judgment of the court below, that it was the duty of the appellants to get the superintendent's certificate within a reasonable time, and not having taken any steps to get it until six years after the superintendent had left the respondent's employment, the failure to produce such certificate was sufficient ground for dismissing the appellant's action.

McCarron v. McGreevy.—xiii. 378.

29. *Sale of goods—Delivery—Non-acceptance by vendee—Return of goods to vendor—Rescission of contract—Re-sale.*

See SALE OF GOODS, 17.

30. *Sale of lands by the acre—"More or less."*

See SALE OF LANDS, 22.

31. *Executory contract—Non-fulfilment of—Action for price—Temporary exception—Incidental demand—Damages—Cross-appeal.*

In March, 1888, B. contracted with C. *et al.*, for the delivery of an engine in accordance with the Herreshoff system to be placed in the yacht "Ninie"

Contract—Continued.

then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st August, C. *et al.* took out a *saisie conservatoire* of the yacht "Ninie," and claimed \$2,199.37 for the work and materials furnished. B. petitioned to annul the attachment and pleaded that the amount was not yet due, as C. *et al.* had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the *saisie conservatoire* was abandoned, and the Court of Queen's Bench, on an appeal from the judgment of the Superior Court in favour of B., both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract and report on the defects. A report was made by which it was declared that C. *et al.*'s contract was not carried out, and that work and materials of the value of \$225 was still necessary to complete the contract.

On motion to homologate the experts' report, the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that court held that as C. *et al.* had not built an engine as covenanted by them, B's plea should be maintained, but as to the incidental demand held the evidence insufficient to warrant a judgment in favour of B. On appeal to the Court of Queen's Bench, that court, taking into consideration the fact that the yacht "Ninie" had, since the institution of the action, been sold in another suit at the instance of one of B.'s creditors and purchased by C. *et al.*, the proceeds being deposited in court to be distributed amongst B.'s creditors, credited B. with \$225 necessary to complete the engine, allowed \$750 damages on B.'s incidental demand, and gave judgment in favour of C. *et al.* for the balance, viz., \$1,225 with costs.

The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings.

On appeal to the Supreme Court of Canada and cross-appeal as to amount allowed on incidental demand by Court of Queen's Bench, it was:—

Held, reversing the judgment of the Court of Queen's Bench, Sir W. J. Ritchie, C.J., and Taschereau, J., dissenting, that as it was shown that at the time of the institution of C. *et al.*'s action, it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C. *et al.* covenanted to build it, their action was premature.

Held, also, that the evidence in the case fully warranted the \$750 allowed by the Court of Queen's Bench on B.'s incidental demand, and therefore he was entitled to a judgment for that amount on said incidental demand with costs.

Taschereau, J., was of opinion, on cross-appeal, that B.'s incidental demand should have been dismissed with costs.

Bender v. Carrier, et al.—xv. 19.

32. Failure of consideration—Impossibility of performance.

When one contracts to do work for another, the preparation for which involves outlay and expense, a corresponding agreement, in the absence of any

Contract—Continued.

express provision, will be implied on the part of the person with whom he contracts to furnish the work; but no such implication will be made where, from circumstances known to, and in the contemplation of, both parties at the date of the agreement to do the work it was, and continued to be beyond, the power of the party to carry out such implied agreement. Henry, J., dissenting.

McKenna v. McNamee.—xv. 311.

**33. Railway company—Agreement with municipal corporation—
Conditions—Performance of.**

A municipal corporation entered into an agreement with a railway company by which the latter was to receive a bonus on certain conditions, one of which was that the company "should construct at or near the corner of Colborne and William streets (in Toronto) a freight and passenger station with all necessary accommodation, connected by switches, sidings, or otherwise with said road" upon the council of the town passing a by-law granting a necessary right of way.

Held, 1. That such condition was not complied with by the erection of a station building not used, nor intended to be used, and for which proper officers, such as station master, ticket agent, etc., were not appointed. Strong, J., dissenting.

2. Per Strong, J., that the condition only called for the construction of a building with the required accommodation and connections, and did not amount to a covenant to run the trains to such station or make any other use of it.

3. The words "all necessary accommodation," in the condition, required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided.

Bickford v. The Town of Chatham.—xvi. 235.

And see RAILWAYS AND RAILWAY COMPANIES, 42.

**34. Railway Co.—Carriage of goods—Liability for negligence—
Transit—Connecting lines.**

One of the conditions in a contract by the G. T. R. Co. to carry goods from Toronto to Portage la Prairie, Man., a place beyond the terminus of their line, provided that the company "should not be responsible for any loss, mis-delivery, damage or detention that might happen to goods sent by them, if such loss, mis-delivery, damage or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits."

Held, that this condition would not relieve the company from liability for loss or damage occurring during the transit, even if such loss occurred beyond the limits of the company's own line.

Held, per Strong and Taschereau, JJ., that the loss having occurred after the transit was over, and the goods delivered at Portage la Prairie, and the

Contract—Continued.

liability of the carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line Portage la Prairie was situate, as bailees for the shipper. (Fournier and Gwynne, JJ., dissenting.)

Grand Trunk Railway Co. v. MacMillan.—xvi. 545.

See RAILWAYS AND RAILWAY COMPANIES, 43.

35. *Claim against the Government—Certificate of engineer—Condition precedent—Arbitration—31 V. c. 12—Costs.*

S. et al., made a contract with Her Majesty the Queen, represented by the Minister of Public Works, for the construction of a bridge for a lump sum. After the completion of the bridge a final estimate was given by the chief engineer, and payment thereof made, but *S. et al.* preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, and caused by changes and alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of the claimants, a new contract between the parties.

Held, reversing the judgment of Henry, J., in the Exchequer, (*See* 1 Exch. C. Reports 301.) Fournier, J., dissenting, that the engineer could not make a new contract binding on the crown; that the claim came within the original contract and the provisions thereof which made the certificate of the engineer a condition precedent to recovery, and such certificate not having been obtained, the claim must be dismissed.

The crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed.

The Queen v. Starrs.—xvii. 118.

36. *Foreign corporation—Telegraph company—Doing business in Canada—Exclusive right—Contract for—Restraint of trade—Public interest.*

In 1869 the E. & N. A. Ry. Co., owning the road from St. John, N. B., westward to the United States boundary, made an agreement with the W. U. Tel. Co., giving the latter the exclusive right for 99 years to construct and operate a line of telegraph over its road. In 1876, a mortgage on the road was foreclosed and the road itself sold under decree of the Equity Court of New Brunswick to the St. J. & M. Ry. Co., which company, in 1883, leased it to the N. B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Tel. Co. under the said agreement, and has been continued ever since without any new agreement being made with the St. J. & M. Ry. Co. or the N. B. Ry. Co. The W. U. Tel. Co. is an American company, incorporated by the State of New York, for the purpose of constructing and operating telegraph lines in the State. Its charter neither allows it to engage, or prohibits it from engaging, in business outside of the State. In 1888, the C. P. Ry. Co. completed a road from Montreal to St. John, a portion of it having

Contract—Continued.

running powers over the line of the N. B. Ry. Co., on which the W. U. Tel. Co. had constructed its telegraph line. The N. B. Ry. Co. having given permission to the C. P. R. to construct another telegraph line over the same road, the W. U. Tel. Co. applied for and obtained an injunction to prevent its being built. On appeal to the Supreme Court of Canada from the decree of the Equity Court granting the injunction,

Held, 1. That the agreement made in 1869 between the E. & N. A. Ry. Co. is binding on the present owners of the road.

2. That the contract made with the W. U. Tel. Co. was consistent with the purpose of its corporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations.

3. The exclusive right granted to the W. U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade.

Held, per Gwynne, J., dissenting, that the comity of nations does not require the courts of this country to enforce, in favor of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land.

Canadian Pacific Ry. Co. v. Western Union Tel. Co.—xvii. 151.

37. Relating to interest in land—Part performance.

See STATUTE OF FRAUDS.

38. Public work—Claim for extra and additional work done on Intercolonial Railway—31 V. c. 13, ss. 16, 17, 18, and 37 V. c. 15—Change of chief engineer before final certificate given—Reference of suppliant's claim to engineer—Report or certificate by chief engineer recommending payment of a certain sum—Effect of—Approval by Commissioner or Minister necessary.

In 1879 the respondent filed a petition of right for the sum of \$608,000 for extra work and damages arising out of his contract for the construction of section 18 of the Intercolonial Railway without having obtained a final certificate from F., who held at the time the position of Chief Engineer. In 1880, F. having resigned, F. S. was appointed Chief Engineer of the Intercolonial Railway and investigated, amongst others, the respondent's claim, and reported a balance in his favor of \$120,371. Thereupon the respondent amended his petition and made a special claim for the \$120,371, alleging that F. S.'s report or certificate was a final closing certificate within the meaning of the contract, which question was submitted for the opinion of the court by

Contract—Continued.

special case. This report was never approved of by the Intercolonial Railway Commissioners or by the Minister of Railways and Canals under 31 Vic. c. 13, s. 18. The Exchequer Court, Fournier, J., presiding, held that the suppliant was entitled to recover on the certificate of F. S. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Exchequer Court, 1st, *per* Ritchie, C. J. and Gwynne, J., that the report of F. S., assuming him to have been the Chief Engineer to give the final certificate under the contract, cannot be construed to be a certificate of the Chief Engineer, which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

2nd, *per* Ritchie, C. J., that the contractor was not entitled to be paid anything until the final certificate of the Chief Engineer was approved of by the Commissioners or Minister of Railways and Canals, 31 V. c. 13 s. 18 and 37 V. c. 15; *Jones v. The Queen*, 7 Can. S. C. R. 570.

3rd, *per* Patterson, J., that although F. S. was duly appointed Chief Engineer of the Intercolonial Railway, and his report may be held to be the final and closing certificate to which the suppliant was entitled under the eleventh clause of the contract, yet as it is provided by the fourth clause of the contract that any allowance for increased work is to be decided by the Commissioners and not by the engineer, the suppliant is not entitled to recover on F. S.'s certificate.

Per Strong and Taschereau, JJ., (dissenting), that F. S. was the Chief Engineer and as such had power under the eleventh clause of the contract to deal with the suppliant's claim and that his report was "a final closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted.

Per Strong, Taschereau and Patterson, JJ., that the office of Commissioners having been abolished by 37 V. c. 15, and their duties and powers transferred generally to the Minister of Railways and Canals, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded to him by the final certificate of the Chief Engineer.

The Queen v. McGreevy.—xviii. 371.

39. Public work—Sub-contract—Engineer's certificate—Condition precedent.

A sub-contract for the construction of a part of the North Shore Railway provided *inter alia* that, "the said work shall, in all particulars, be made to conform to the plans, specifications and directions of the party of the second part, and of his Engineer, by whose classifications, measurements and calculations, the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials which, in his opinion, do not conform to the spirit of this agreement, and who shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision

Contract—Continued.

shall be conclusive and binding upon both parties hereto. The aforesaid party of the second part hereby agrees, and binds himself, that upon the certificates of his Engineer, that the work contemplated to be done under this contract has been fully completed by the party of the first part, he will pay said party of the first part for the performance of the same in full, for materials and workmanship. It is further agreed, by the party of the second part, that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by second party upon the estimate and certificate of his engineer, to the party of the first part, on or before the 20th day of each month, for the amount and value of work done, and materials furnished during the previous month, ten per cent. being deducted and retained by the party of the second part until the final completion of the work embraced in this contract, when all sums due the party of the first part shall be fully paid, and this contract considered cancelled."

Upon completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at \$79,142.65, and after deducting the money paid to and received by the sub-contractor, and a clerical error appearing on the face of the certificate, a sum of \$4,187.32 remained due to the sub-contractor.

Upon an action brought by the sub-contractor to recover the sum of \$86,312.12, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, granted the plaintiff the amount of \$4,187.32 with interest and costs. On appeal to the Supreme Court:

Held, affirming the judgment of the court below, that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but if not the plaintiff must fail as a final certificate of the engineer was a condition precedent to his right to recover.

Gulbault v. McGreevy.—xviii. 609.

40. Construction of—Employment of Physician by board of health
—Attendance upon small-pox patients for the season—
Dismissal—Form of remedy.

See MUNICIPAL CORPORATION, 14.

41. Railway Company—Contract to carry passenger—Special
Contract—Reduced fare—Notice of conditions—Negligence.

See RAILWAYS AND RAILWAY COMPANIES, 58.

42. Public work—Sub-contract—Rescission—*Quantum meruit*—
Arbitration.

See ARBITRATION AND AWARD, 23.

43. Of sale—Particular chattel—Representation.

See SALE OF GOODS, 20.

Contract—Continued.

- 44. Special—Common Carrier—Exemption from liability—Baggage**
“ at owners risk against all casualties.”

See CARRIERS, 5.

- 45. Master and Servant—Agreement for service—Construction of—**
Arbitrary right of dismissal—Forfeiture of property.—

See MASTER AND SERVANT, 2.

- 46. Suretyship—Endorsement of note—Right to commission for**
endorsing—Consideration.

M., by agreement in writing, agreed to become surety for McD. & S. by endorsing their promissory note, and McD. & S. on their part agreed to transfer certain property to M. as security, to do everything necessary to be done to realize such securities, to protect M. against any loss or expense in regard thereto, or in connection with the note, to pay him a commission for endorsing, and to retire said note within six months from the date of the agreement. The note was made and endorsed and the securities transferred, but McD. & S. were unable to discount it at the bank where it was made payable, and having afterwards quarrelled with each other the note was never used. In an action by M. for his commission :

Held, affirming the decision of the Court of Appeal for Ontario, Taschereau and Gwynne, JJ., dissenting, that M. having done everything on his part to be done to earn his commission, and having had no control over the note after he endorsed it, and being in no way responsible for the failure to discount it, was entitled to the commission.

McDonald v. Manning.—xix. 113.

- 47. Damages to property from works executed on Government railway—Parol undertaking to indemnify owners for costs of repairs by officer of the Crown—Effect of.**

Held, affirming the judgment of the Exchequer Court, that where by certain work done by the Government Railway authorities in the city of St. John the pipes for the water supply of the city were interfered with, claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and servicable condition, under an arrangement made with the Chief Engineer of the Government railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong and Gwynne, JJ., dissenting on the ground that the Chief Engineer had no authority to bind the Crown to pay damages beyond any injury done.

The Queen v. The St. John Water Commissioners.—xix. 125.

Contract—Continued.**48. *Monies entrusted for investment—Condition precedent—Prescription—Art. 2262 C.C.—Transfer—Prête-nom.***

H. having funds belonging to one T. J. C. for investment, agreed to invest them with M. of Winnipeg in a certain land speculation, and after correspondence accepted and paid M.'s draft for \$2,375, mentioning in the letter notifying M. of the acceptance of the draft the understanding H. had as to the share he was to get and adding: "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed and the conditions of the prospectus never carried out. T. J. C. transferred *sous seing privé* this claim to the plaintiff who brought an action against M. for the amount of the draft.

Held, affirming the judgment of the Superior Court for L. C. and the Court of Q. B. for L. C. (appeal side). (1.) That the action being for the recovery of a sum of money entrusted to the defendant for a special purpose, the prescription of two years did not apply.—Art. 2262 C. C. (2.) That the conditions upon which the money had been advanced were conditions precedent and not having been fulfilled, M. was bound to refund the money. (3.) That the transfer *sous seing privé* of the claim to plaintiff had been admitted by M., and the plaintiff, even if considered as a *prête-nom*, had a sufficient legal interest to bring the present action.

Moodie v. Jones.—xix. 266.

49. *Construction of railway—Bond—Condition—Mutuality.*

H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditioned, within four days, to provide two acceptable sureties and deposit 5 per cent of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action against H. on the bond:

Held, affirming the judgment of the Court of Appeal for Ontario, that the agreement made by the bond was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into H. was not liable on the bond.

The Brantford, Waterloo and Lake Erie Railway Co. v. Huffman.—xix. 336.

50. *Sub-Contract for mason work—Quality of work—Conversation between the parties—Claim for increased price.*

See EVIDENCE, 56.

Contract—Continued.**51. Corporation—Contract of—Seal—Performance—Adoption—Municipality—By-law—Manitoba Municipal Act, 1884, s. 111.**

A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. Ritchie, C.J. and Strong, J., dissenting.

In section 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. Ritchie, C.J. and Strong, J., dissenting.

Bernardin v. The Municipality of North Dufferin.—xix. 581.

52. Sale of land or equity of redemption—Matters for future arrangement—Statute of frauds.

See SALE OF LANDS, 29.

53. Engineer's certificate—Finality of—Bulk sum contract—Deductions—Engineer's powers—Interest.

In a bulk sum contract for various works and materials executed, performed and furnished on the Quebec Harbour Works, the contractors were allowed by the final certificate of the engineers a balance of \$52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors (appellants) for \$181,241 for alleged balance of contract price and extra work,

Held, 1. That the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done stated in the specifications and the quantities actually done, and therefore the certificate in this case should be corrected in that respect.

2. That interest could not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th February, 1886.

Strong and Gwynne, JJ., were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs.

Peters v. The Quebec Harbour Commissioners.—xix. 685.

Contract—Continued.**54. Construction of—Telephone service—Transmission of message—Use of wires.**

The Bell Telephone Co. carried on the business of executing orders by telephone for messenger boys, cabs, etc., which it sold to the Elec. Desp. Co., agreeing among other things not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, etc., to any person or persons, company or corporation, except to the Elec. Desp. Co. The G. N. W. Tel. Co. afterwards established a messenger service for the purposes of which the wires of the Telephone Co. were used. In an action for breach of the agreement with the Elec. Desp. Co. and for an injunction to restrain the Telephone Co. from allowing their wires to be used for giving orders for messengers, etc.

Held, Ritchie, C.J., doubting, that the Telephone Co., being ignorant of the nature of communications sent over their wires by subscribers, did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted; and that the Telephone Co. was under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications with a view to preventing such orders being given.

Electric Despatch Company of Toronto v. Bell Telephone Company of Canada. —xx. 88.

55. For use of booms—Consideration—Boomage charges—Estoppel by conduct—Compensation.

See ESTOPPEL, 18.

56. Deed of land—Undisclosed trust—Deed in name of third party—Specific performance—Collusion.

See SPECIFIC PERFORMANCE, 5.

57. Bond—Illegal consideration—Stifling prosecution.

In an action on a bond executed by J. to secure an indebtedness of L. to plaintiff bank the evidence showed that L., who had married an adopted daughter of J., was agent of the bank, and having embezzled the bank funds the bond was given in consideration of an agreement not to prosecute.

Held, affirming the judgment of the court below, that the consideration for said bond was illegal and J. was not liable thereon.

The People's Bank of Halifax v. Johnson.—xx. 541.

58. Contract—Carriage of mails—Authority of P. M. G. to bind the Crown—R. S. C. c. 35.

An action will not lie against the Crown for breach of a contract for carrying mails for nine months at the rate of \$10,000 a year, made by parol with the Postmaster-General and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a

Contract—Continued.

larger sum than \$1,000 it could not be made without the authority of an order in council, and if temporary it was revocable at the will of the Postmaster-General.

Humphrey v. The Queen.—xx. 591.

59. For rescue of stranded tug—Action by agents—Salvage.

See MARITIME COURT OF ONTARIO, 7.

60. Application for insurance—Agreement to forward—Escrow.

See INSURANCE, MARINE, 33.

61. For exchange of lands—Time, essence of contract—Extension
—Conduct of party seeking relief.

See SPECIFIC PERFORMANCE, 7.

62. Municipal Corporation—Executory contract for purchase of
fire engine—Necessity for by-law.

See MUNICIPAL CORPORATION, 28.

63. Of towage, authority to make.

See MARITIME COURT OF ONTARIO, 8.

AGREEMENT.

PETITION OF RIGHT, 16.

SALE OF GOODS.

SALE OF LANDS.

- Contributory**—Right of action against, in winding up proceedings
under the Imperial Companies' Act, 1862.

See CORPORATIONS, 15.

2. Of Bank of P.E.I.—Liability of, under 18th V. c. 10, & 19th V.
c. 11, (P.E.I.)

See BANKS AND BANKING, 7.

3. Right of set off by, in action against.

See BANKS AND BANKING, 8.

4. Of joint stock company—Subscription for stock—Payment by
services.

See CORPORATIONS, 2.

Contributory—Continued.

5. Of insolvent Company who is also creditor, cannot set off debt due to him by Company—Winding up—Bank Act R. S. C. c. 120.

See WINDING UP, 7.

Conversion by Sheriff.

See CORPORATIONS, 5.

TROVER.

Copyright.—Infringement of—Source of information—Statutory form of notice of—38 V. c. 88, s. 9.

The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted work therefor.

In works of this nature where so much may be taken by different publishers from common sources and the information given must be in the same words, the courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence.

The notice of copyright to be inserted in the title page of a copyrighted work is sufficient if it substantially follows the statutory form. Therefore the omission of the words "of Canada" in such form is not a fatal defect, and, even if a defect, such defect is removed by s. 7, s-s. 44 of the Interpretation Act.

Depositing in the office of the Minister of Agriculture copies of a book containing notice of copyright before the copyright has been granted does not invalidate the same when granted.

Garland v. Gemmill—xiv. 321.

Corporations—Public Company under 27 & 28 V. c. 23—Shareholders liabilities.

Certain shares in a company incorporated by letters patent, issued under 27 & 28 V. c. 23, were allotted, by a resolution passed at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. discount, deducted from their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was allotted nine shares, which were subsequently assigned to the appellant for value as fully paid up. Appellant enquired of the secretary of the company, who also informed him that they were fully paid-up shares, and he accepted them in good faith as such, and about a year afterwards became a director in the company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share-book the amount mentioned was "Shares, two, at \$300—\$600."

Corporations—Continued.

Held, reversing the judgment of the Court of Appeal for Ontario, that a person purchasing shares in good faith, without notice, from an original shareholder under 27 & 28 V. c. 23, as shares fully paid up, is not liable to an execution creditor of the company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares. (Richards, C.J., and Ritchie, J. dissenting.)

McCracken v. McIntyre.—i. 479.

2. Railway Company—Mortgage by, of road.

See RAILWAYS AND RAILWAY COMPANIES, 1.

3. Railway Company—Liability of, for Fraudulent Shipping Note issued by Agent.

See RAILWAYS AND RAILWAY COMPANIES, 5.

4. Want of Seal.

See INSURANCE, LIFE, 2.

5. Sale by Corporation—Attachment—Absent and Absconding Debtor's Act of Nova Scotia, c. 97, Rev. Stats. of N. S.—Demurrer—Conversion by Sheriff—Justification under Order of Court—Seal.

One H. instituted proceedings against L. C. M. Company, the officers of which resided in the United States, but which did business in Nova Scotia and, on the 25th May, 1872, caused a writ of attachment to be issued out of the Supreme Court at Amherst, under the Absent and Absconding Debtors Act of Nova Scotia, directed to the appellant, the High Sheriff of the County of Cumberland. Under this writ, the appellant seized certain chattels as being the chattels of the said company. On the 12th November, 1872, an order was issued out of the said court, directing the appellant to sell, and the appellant did sell said chattels as being of a perishable nature. On the 11th December, 1874, a discontinuance was filed in the said cause by H. On the 30th May, 1876, the respondent commenced an action against appellant for the conversion of the chattels in question, contending that the company, having failed in its operations and being desirous of winding up its affairs, and being indebted to him, had sold and conveyed to him the said chattels by a certain memorandum of sale, dated 5th July, 1867, "signed on behalf of the company," by one "Hawley, agent." To this memorandum a seal was affixed which did not purport to be the seal of the company. The appellant pleaded to the declaration, that he did not convert; goods not plaintiff's: not possessed; and also a special plea of justification, setting forth the proceedings by H., and that he seized and sold the goods as the goods of the company, in obedience to the attachment and order issued in said proceedings. The respondent replied, setting up the discontinuance. The appellant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the

Corporations—Continued.

sale. He also demurred, on the ground that, being bound to obey the order of the court, he could not be affected by the discontinuance.

At the trial a verdict of \$500 damages was rendered for respondent. The appellant obtained a rule *nisi* to set aside verdict, and the rule and demurrer were argued together. The court below refused to set aside the verdict and gave judgment for plaintiff on the demurrer.

Held, that the appeal should be allowed; that the plea of justification showed a sufficient answer to the declaration; that the replication was bad, and that the verdict must be set aside and judgment be for the defendant on the demurrer.

Per Ritchie, J., dissenting.—The seizing under the attachment, and not the sale, constituted the conversion; there was sufficient evidence to show that the chattels in question had been transferred by the company to respondent, and under s. 15, c. 54 of the Revised Statutes of Nova Scotia, the sale of the chattels did not require to be under the corporate seal of the company.

Per Strong, J.—The sale, and not the seizure, was the conversion complained of, and to this the order of the court was a sufficient answer.

Semble, a mere taking of the goods of a third person under a *mesne* attachment against a defendant to keep them *in medio* until the termination of the action is not a conversion.

Per Henry, J.—The order for the sale would not have been a justification for the original levy on the goods, as well as for the sale, if they had been the property of the respondent, but the evidence failed to show a sale by the company to the respondent. Such a sale would require to be under the corporate seal of the company, and did not come within the meaning of s. 15, c. 53 of the Revised Statutes of Nova Scotia.

McLean v. Bradley.—ii. 585.

6. *Shareholder in public company—Action against by creditors of company—Registration of certificate—Con. Stat. C. c. 63, ss. 33, 35.*

In an action brought by McK. under the provisions of Con. Stats. Can. c. 63, against K. *et al.*, as stockholders of a joint stock company incorporated under said Act, to recover the amount of an unpaid judgment they had obtained against the company, the defendants K. *et al.*, pleaded, *inter alia*, that they had paid up their full shares and thereafter and before suit had obtained and registered a certificate to that effect.

Held, affirming the judgment of the Court of Common Pleas, that under ss. 33, 34 & 35, c. 63, Con. Stats. Can., as soon as a shareholder has paid up his full shares and has registered, although not until after the 30 days mentioned in sec. 35, a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always debts to employees, as specially mentioned in s. 36. (Ritchie, C. J., and Fournier, J., dissenting.)

McKenzie v. Kittridge.—iv. 368.

Corporations—Continued.

7. *Trespass by individual corporators—Plea—Corporation may sue its members—Rev. Stats. N. S. (4th series) c. 23, s. 30.*

J. C. and J. A. C., while trustees of school section No. 16, south district of Pictou county, and N. C. as their servant, entered upon the school plot belonging to their section, removed the school house from its foundation and destroyed a portion of the stone wall. Subsequently, the trustees of said school section brought an action for trespass *quare clausum fregit* and *de bonis asportatis* against the said J. C., J. A. C. and N. C., for injury done to the school house, the property of the section. The defendants pleaded *inter alia* justification of the acts complained of, asserting that the acts were legally performed by them in their capacity of trustees. S-s. 4 of a. 30, c. 23, Rev. Stats. N. S. (4th series), declares that the sites for school houses shall be defined by the trustees, subject to the sanction of the three nearest commissioners residing out of the section. In this case the sanction of the three nearest commissioners was not obtained.

Held, on appeal, that under c. 23, Rev. Stats. N. S. (4th series) J. C., J. A. C. and N. C. were not authorized to remove the school house from its site in the manner mentioned. That defendants having subsequently abused their right to enter upon the lands of the corporation by an overt act of spoliation, the plaintiffs, who are a corporate body and are identical with the corporation which existed at the time of the trespass, can maintain trespass against the defendants for the injury done to the corporate property. That when an action is brought in the name of a corporation without due authority, it is not sufficient for the defendants to plead that the plaintiffs did not legally constitute the corporation, but in such a case defendants ought to apply to the summary jurisdiction of the court to stay proceedings.

Pictou School Trustees v. Cameron.—ii. 690.

8. *Allotment of stock—Notice of—R. W. Co.—Action by creditor against a shareholder—Conditional agreement.*

The appellant, a judgment creditor of the T. G. & B. Railway Co., sued the respondent as a shareholder therein, for unpaid stock. From the evidence it appeared that the respondent signed the stock book, which was headed by an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay ten per cent. of the amount of the said shares and all future calls. The company, on the 1st July, passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the amount of shares held by him. The secretary prepared them, including one for the respondent, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice, signed by the secretary, in a daily paper, notifying subscribers to the capital stock of the T. G. & B. Railway Co., that the first call of ten per cent. on the stock was required to be paid immediately to them. The respondent never called for or received his certificate of allotment, and never paid the ten per cent., and swore that he had never had any notice of the allotment having

Corporations—Continued.

been made to him. The case was tried twice, and the learned judge, at the second trial, although he found that the respondent had subscribed for fifty shares and had been allotted said fifty shares, was unable to say whether respondent had received actual notice of allotment.

Held, affirming the judgment of the Court of Appeal, that the document signed by the respondent was only an application for shares, and that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to respondent, and that no notice whatever of such allotment had been proved. (Ritchie, C.J. and Gwynne, J., dissenting).

Nasmith v. Manning.—v. 417.

9. *Company—Action for calls—Misrepresentation—Contract—Repudiation—Acquiescence by receipt of dividend.*

The Stadacona Insurance Company, incorporated in 1874, employed local agents to obtain subscriptions for stock in the district of Quebec, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, F. X. C., intending to subscribe for five paid-up shares, paid \$500 and signed his name to the subscription book, the columns for the amount of the subscription and the number of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without F. X. C.'s consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to Quebec and endeavoured, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875 the company declared a dividend of 10 per cent. on the paid-up capital (*montant versé*) and the plaintiff received a check for \$50, for which he gave a receipt. In the following year the company suffered heavy losses, and, notwithstanding F. X. C.'s repeated endeavours to be relieved from the larger liability, brought an action against him to recover the 3rd, 4th, 5th and 6th calls of five per cent. on 50 shares of \$100 each, alleged to have been subscribed by F. X. C. in the capital stock of the company.

Held, Ritchie, C.J., *dubitante*, reversing the judgment of the court below, that the evidence showed the appellant never entered into a contract to take 50 shares; that the receipt given for a dividend of 10 per cent. on the amount actually paid (*montant versé*) was not an admission of his liability for the larger amount, and he therefore was not estopped from showing that he was never, in fact, holder of 50 shares in the capital stock of the company.

Cote v. Stadacona Ins. Co.—vi. 193.

10. *Shareholders—Rights of—The Banking Act, 34, V. c. 5, ss. 19 and 58—Resolutions by directors and shareholders not binding on absent shareholders—Equitable plea.*

Bank of L. brought an action against S., the appellant (defendant), as shareholder, to recover a call of 10 per cent. on twenty-five shares held by him

Corporations—Continued.

in that bank. By the 7th plea, and for defence on equitable grounds, defendant said, "that before the said call or notice thereof to the defendant, the defendant made, in good faith and for valid consideration in that behalf, a transfer and assignment of all the shares and stock which he had held in the bank of L. to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays that the said bank of L. shall be compelled and decreed to make and complete the said transfer, and to do all things required on its part to be done to make the said transfer valid and effectual, and the said bank of L. be enjoined from further prosecution of this suit."

The plaintiffs filed no replication to this plea, but at the trial of the action, which took place before James, J., without a jury, they attempted to justify the refusal to permit the transfer of the shares upon the ground that at a special general meeting of the shareholders of the bank of L., held on the 26th June, 1878, it was resolved "that, in the opinion of the meeting, the bank of L. should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect."

The defendant was not present at the meeting when this resolution was passed, and it appeared from the evidence that the bank of L. effected a loan of \$80,000 from the bank of S. upon the security of one B., who, to secure himself, took bonds for lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares. This he did in 1877 to certain persons then in good standing, and powers of attorney, executed by defendant and the purchasers respectively, were sent to the manager of the bank of L., in whose favour they were drawn, to enable him to complete the transfer. The directors of the bank of L. refused to permit the transfer, but the defendant was not notified of their refusal, nor did they make any claim against him for any indebtedness on his part to the bank; and it appeared also from the evidence that subsequently to the resolution of the 26th of June, 1878, and prior to the sale by defendant of his shares, a large number of other shares had been transferred in the books of the bank. In October, 1879, the bank of L. became insolvent, and the bank of S., the respondents, obtained leave to intervene and carry on the action.

At the trial a verdict was found by the judge in favor of the appellant; but the Supreme Court of Nova Scotia, James, J., dissenting, made absolute a rule *nisi* to set aside the verdict.

On appeal to the Supreme Court of Canada, it was Held, reversing the judgment of the Supreme Court of Nova Scotia, that the resolution of the 26th June, 1878, could not bind shareholders not present at that meeting, even if it had been acted upon, and under the facts disclosed in evidence

Corporations—Continued.

the defendant could not be deprived of his legal right under the Banking Act to transfer his shares, and to have the transfer recorded in the books of the bank; and the 7th plea was therefore a good equitable defence to the action.

Per Strong and Gwynne JJ.—It is doubtful whether the strict rules applied in England to equitable defences pleaded under the C. L. Procedure Act, should be adopted with reference to such pleas in Nova Scotia, where both legal and equitable remedies are administered by the same court and in the same form of procedure.

Smith v. Bank of Nova Scotia.—viii. 558.

11. *Liability of Public Company—Shareholder—27 & 28 V. c. 23—Estoppel—Mortgage of shares.*

The Ontario Wood Pavement Company, incorporated under 27 & 28 V. c. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from \$130,000 to \$250,000 before the original capital stock had been paid in. *P. et al.*, execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against A. as holder of shares not fully paid up in said company. It appeared from an examination of the books that the shares alleged to be held by A. were shares of the increased capital and not of that originally authorized.

Held, affirming the judgment of the Court of Appeal, that as there was evidence that the original nominal capital of \$130,000 was never paid in, the directors had no power to increase the stock of the company, and as the stock held by A. consisted wholly of new unauthorized stock, *P. et al.* were not entitled to recover.

Per Gwynne, J., dissenting.—The objection not having been taken by the defendant, or tried, the court, under s. 22, c. 88, R. S. O., should put the questions of fact upon which the validity and sufficiency of the objections suggested by the court rested, into a course for trial in due form of law.

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock.

Per Strong and Henry, JJ. (Gwynne, J. contra)—That although A., a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. 27 & 28 V. c. 23, s. 5, s-s. 19.

Page v. Austin.—x. 132.

12. *45 V. c. 23 (D.)—Construction of—Foreign Company—Winding-up.*

The Steel Company of Canada (limited), incorporated in England under the Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business

Corporations—Continued.

in Nova Scotia, and having its principal place of business at Londonderry, Nova Scotia, was, by order of a judge, on the application of the respondents and with the consent of the company, ordered to be wound-up under 45 V. c. 23 (D.). The appellants, creditors of the Steel Company, intervened, and objected to the granting of the winding-up order on the ground that 45 V. c. 23, was not applicable to the company.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Fournier, J., dissenting, that 45 V. c. 23 was not applicable to such company.

The Merchants Bank of Halifax v. Gillespie.—x. 812.

13. Liability of, for Libel.

See LIBEL.

14. Benefit Society—Expulsion of member from.

See BENEFIT SOCIETY.

15. *The Imperial Companies' Act, 1862—Order making calls against past member—Right of action thereon—Declaration—Demurrer.*

The defendant was a holder at one time of 100 shares in Barned's Banking Company (limited) but had ceased to be a member of the company before the commencement of the winding-up. An order for the winding-up of the said company having been made by the High Court of Chancery in England, and the defendant having been placed upon the list of contributories, pursuant to the provisions of the Winding-Up Act, the said court, by an order made 2nd January, 1870, made a call on the defendant for a certain sum in respect of his shares in the said company, and directed him to pay it to one of the official liquidators.

Subsequently to this order, the plaintiffs commenced this action in the Court of Queen's Bench for Upper Canada, and their declaration being demurred to by the defendant, the matter was argued in Hilary Term, 1875, and the demurrer disallowed. The case is reported in 36 U. C. Q. B. 456.

Afterwards the plaintiffs amended their declaration as suggested in the judgment then given, by charging the defendant distinctly as a past member, and, the amended declaration being again demurred to, the matter was argued before the Court of Queen's Bench, on 4th October, 1877, and the demurrer was allowed, Wilson, J., dissenting. The decision is reported in 40 U. C. Q. B. 485.

From this decision the respondents appealed to the Court of Appeal for Ontario, and on 23rd December, 1878 that court delivered judgment reversing the decision of the Court of Queen's Bench, and allowing the appeal. Reported 3 Ont. App. R. 371.

The defendant appealed to the Supreme Court of Canada from that judgment, which decided that the liability of the defendant to pay the calls

Corporations—Continued.

was a debt which originated at the time he became a holder of the shares, and that the plaintiffs were entitled to sue him here for the recovery thereof.

The declaration set out ss. 6, 7, 88, and s.-ss. 1, 2, 3 & 4 of s. 88; ss. 74, 75, 79 s.-ss. 4 & 5; s. 80 s.-s. 4; ss. 81, 83, 93, 98, 102 & 106 of the Imperial Companies' Act of 1862, 25 and 26 V. c. 89. The declaration then set out that the plaintiffs were a company duly incorporated and registered in England under the said Act, and limited by shares, and the defendant was the holder of one hundred shares in the capital stock of the said company, and was, in respect of the said shares, a member of the said company, and had not ceased to be a member for the period of a year or upwards prior to the commencement of the winding-up thereafter mentioned, and was liable, in respect of the said shares, to contribute as a past member to its assets in the event of its being wound up, and the said company became unable to pay its debts, and thereupon such proceedings were had in the High Court of Chancery in England, before the Master of the Rolls, one of the Judges of that court, that it was proved to the satisfaction of the said court that the said company was unable to pay its debts, and the said court was of opinion that it was just and equitable that the said company should be wound up, and an order was duly made by the said court for the winding up of the said company by the said court, and all things happened and were done necessary to make the said order valid under the said Act, and by other orders of the said court Harwood Walcot Banner and John Young were duly appointed official liquidators of the said company, and by another order of the said court, made as soon as might be after the making of the said order for winding up the said company, the said court duly settled the list of contributories to the assets of the said company, and thereby declared the defendant to be, and settled him on the said list as a contributory in respect of the said one hundred shares as a member or contributory in his own right, and as included in the list of contributories, on the sixth day of December, A. D. 1867, and afterwards by an order duly made on the second day of January, 1870, by the said court, the said court made a call upon the defendant of thirty-three pounds sterling per share in respect of fifty of the said shares for which the defendant had been so settled in the list of contributories, and a call of thirty-nine pounds ten shillings sterling per share in respect of the other fifty of the said shares, and ordered that the defendant should, on or before the ninth day of September, 1870, or within twenty-four days after the service of the said order, pay the said sum of three thousand six hundred and twenty-five pounds to the said Harwood Walcot Banner, of 26 North John street, Liverpool, in the county of Lancaster, one of the said official liquidators, such sum being by the said order declared to be the amount due from the defendant in respect of the said calls of thirty-three pounds per share, and of thirty-nine pounds ten shillings per share. And the said order was, before the said ninth day of September, duly served upon the defendant, and the said Act of Parliament or law, during all the time aforesaid, was and is still in full force, and was and is the law of England; and all things happened and were done, and all times elapsed necessary to render the defendant liable to pay the said sum of money, and to entitle the plaintiffs to maintain this action for the non-payment thereof, and the said sum of money is equal to the sum of seventeen thousand six hundred and forty-two dollars of lawful money

Corporations—Continued.

of Canada, yet the defendant had not paid the same, and the plaintiffs claimed thirty thousand dollars.

To this declaration the defendant demurred on the following grounds:—

That the declaration did not show any facts or circumstances which, under the laws in force in this province, give the plaintiffs any right of action against the defendant: That said declaration did not show that under the alleged Act of Parliament, or under the law of England the plaintiffs had any right of action against the defendant: That it appeared by said declaration, that the said company of the plaintiffs was being wound up by the High Court of Chancery in England, and under the authority of the alleged Act of Parliament in the declaration mentioned, and the plaintiffs were not shown to have the power under said Act to sue or bring actions for any call made by said court: That it was not shown that any calls were made on the alleged shares before said order for winding-up was made, or that the defendant was the holder of the said shares, or any of them, at the time of making any such calls or that he ever became indebted to the plaintiffs upon or in respect of the said shares, or any of them: That it appeared by said declaration that defendant had ceased to be the holder of any of the said shares before the commencement of the winding-up of the said company, and that the defendant was at most only a past member: That under the law of this country the defendant would not be liable for any call made after he ceased to be a holder of said shares, and the declaration did not show any provision of English law that made him liable to the plaintiffs for any such call: That it appeared by the English law as set out in said declaration that a past member like the defendant was not subject to the same liability as a present member, and said declaration did not show that any debts or liabilities of the said company existed to or in respect of which defendant was liable to contribute or in respect of which he could be placed on the list of contributories, or that he was liable to contribute anything: That as the plaintiffs were now suing on a law not in force in this country, and were claiming a liability which did not exist under the laws of this country, they were bound to show that the liability they claimed clearly existed under the English law, which they had not done: That it appeared by said declaration that after an order had been made for winding up a company all power in regard to collecting or getting in the assets of the said company was invested in the said Court of Chancery, which was a specially appointed tribunal for that purpose and had special and extraordinary powers which could not be enforced in this country: That it appeared that any proceedings had were not final, and that said court had power to rectify the list of contributories and could at any time remove the defendant's name from such list: Also, that said court had the power to restore to the defendant all or any part of the moneys which he might pay under the said order making said calls, and that the English law as presented by said declaration showed that the proceedings had were not final in their character like a judgment, and the rights of plaintiffs, if any, could be enforced only by said special tribunal, and not by suit at law in this country.

On appeal to the Supreme Court of Canada, *Held, per Ritchie, C.J., and Fournier and Henry, JJ., (Strong and Gwynne, JJ., dissenting), that assuming*

Corporations—Continued.

an action at law will lie for a call, such as was claimed to be due in this case, as plaintiffs could not avail themselves of s. 109 of The Companies' Act, 1862, to declare generally, nor of s. 106 of said Act, making the order conclusive evidence that the money ordered to be paid was due, for the reason that neither of those sections applies to actions brought in this country; and as defendant's liability, if any, was not on the order as a final judgment, but was a purely statutory liability of a limited character, it was necessary to allege in the declaration everything required by the statute to fix the limited liability of a past member on the defendant, and which allegation, if traversed, the plaintiff would be bound to prove, and as the declaration on its face contained no such allegations as show any such liability of defendant as a past member, it was therefore bad.

2. *Per Henry and Taschereau, JJ.*—That the declaration did not show any right under the Act in the plaintiffs to sue in their own name.

Appeal allowed with costs.

Reynolds v. Barned's Banking Company.—8rd Feby., 1880.

16. *Saint John City—Power of Mayor, &c., to raise the level of the streets—Raising a street in part and erecting fence on part so raised by which access to the street is cut off—Non-suit—Charter of city—Municipal Councils, powers of.*

By the charter of the city of Saint John the corporation was given power to alter, amend and repair streets theretofore laid out, or thereafter to be laid out. The charter is confirmed by 26 Geo. III. c. 46, and the right to alter the levels of streets is recognized by 9 Geo. IV. c. 4. Church street was not one of the streets originally designated on the plan of the city. It was made a public street in 1811, on petition of the owners of the land through which it passes, who gave the land for the street. In 1874 the corporation raised Church street below Canterbury street, filling it in to within four or five feet of the plaintiff's house and shop. On the embankment so made in front of the plaintiff's house and shop the corporation erected a fence. By reason of this the plaintiff had no access from the street to his house and shop, but reached them by the narrow passage left next the house and shop running easterly towards Canterbury street and westerly toward Prince William street.

An action having been brought against the Mayor, &c., of the city for the damage sustained by the plaintiff by reason of so filling in the street and erecting the fence, the plaintiff was non-suited by Duff, J., on the ground that the charter and Acts of Assembly gave the defendants full authority to raise the level of the street, and that in them was vested the sole discretion as to the time and manner of doing it, and that having exercised a *bond fide* discretion in the matter and raised it, the damage sustained by the plaintiff was not the subject of an action; that as to the erection of the fence on the wall it was necessary for the protection of the public, and that it was the duty of the defendants to put it there for that purpose.

This non-suit was set aside by the Supreme Court of New Brunswick, it being there held by Weldon, Fisher and Wetmore, JJ., Allen, C.J., and Duff, J.,

Corporations—Continued.

dissenting, that the corporation had no right to fill in the street in the manner in which they did it, and to erect the fence on the embankment in front of the plaintiff's house and shop, and that the manner in which the corporation had filled in the street and erected the fence, was of itself evidence that they had acted carelessly and without reasonable skill and care and that the consideration of this should not have been withdrawn from the jury. (*See 2 Pugs. & Bur. 686.*)

On appeal to the Supreme Court of Canada, *Held*, that the non-suit should not have been set aside. *Fournier and Henry, JJ.*, dissenting.

Per Gwynne, J., Taschereau, J., concurring—That the defendants have, under the several Acts of Parliament which confirm and amend their charter, complete legislative power to raise or lower the level of the streets to any extent that the irregularities of the ground may seem to the corporation and its council, as representing the public, to require for the benefit and convenience of the public, cannot be doubted: the councils of these municipal corporations are themselves a deliberative-law making assembly, chosen by the people to do whatever, within their jurisdiction, may in their judgment be necessary for the public benefit, and the powers conferred upon them must therefore have a liberal construction in view of the public rather than of private interests. The power of altering, amending, repairing and improving the streets, which is a power vested in the corporation for the benefit of the public, whose representatives the council of the corporation are, is restricted by no condition save only the implied condition that what shall be done in the name of the public, and ostensibly for their benefit and convenience, shall not be done in such a manner as in reality to constitute a public nuisance.

The plaintiff has never rested his right to maintain this action upon the ground that the act complained of is a public nuisance from which he sustained peculiar injury, and as he could not succeed without establishing the act of which he complains to be such public nuisance, the non-suit was right and should be affirmed.

Present: *Ritchie, C.J.*, and *Fournier, Henry, Taschereau and Gwynne, JJ.*

The Mayor, &c., of St. John v. Pattison—10th June, 1880.

17. *Building society—By-law—C. 69, C. S. L. C.—Purchase of land—Ultra vires.*

La Cie de V., a building society incorporated under c. 69, *Con. Stats. L. C.*, by its by-laws, on the 21st August, 1874, declared that the principal object of the society was to purchase building lots, and to build on such lots, cottages costing about \$1,000 each for every one of its members. In order to attain its object, the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-laws, and contracted for the building of twenty-four cottages at \$1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed during which the cottages were built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, being shareholders in the Do-

Corporations—Continued.

minion Building Society, borrowed money from the latter society, and transferred to the same, as collateral security, the moneys due them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some monies on account, and finally a deed of settlement *acte de reglement de comte* was executed between the two companies, upon which was based the suit against the appellants, brought by H. the respondent, as assignee of the Dominion Mortgage Loan Company, which name was substituted for that of "The Dominion Building Society," by 40 V. c. 80 (D.).

Held, affirming the judgment of the court below, Strong and Gwynne, JJ., dissenting, that the transaction in question was within the objects and purposes for which the society was incorporated, and was therefore not *ultra vires*. See 3 Dorion's R. 175.

La Compagnie de Villas du Cap Gibraltar v. Hughes.—xi. 537.

18. *Public streets—Duty of Corporation as to repairs.*

W. was the proprietor of an omnibus line running through some of the principal streets of Halifax under license from the corporation. Owing to the want of repair on some of the streets, and the accumulation of snow and ice, the conveyances could not be run according to time table, and there was a falling off in the number of passengers; moreover, some of the horses were injured and vehicles broken or damaged by the rough state of the streets.

Held, 1. Ritchie, C.J., dissenting, that it was the duty of the corporation to keep the streets in good repair; and 2. Gwynne, J., dissenting, that the plaintiff was entitled to retain his verdict, having proved special injury, and the damages awarded not being too remote nor excessive.

Judgment of the Supreme Court of Nova Scotia affirmed and appeal dismissed with costs. See 4 R. & G. 371.

The City of Halifax v. Walker.—16th February, 1885.

19. *Negligence—Defective state of public bridge—Liability of municipality for—Damages—New trial—Misdirection.*

An action was brought against the municipality of Colchester for damages on account of injury to the plaintiff from falling over a bridge at Acadia Mines, such bridge being at the time very much out of repair, about twenty feet of the railing on one side having fallen away. At the trial, it was proved that one of the standing committees of the municipal Council was a committee on roads and bridges, whose duty it was, among other things, to report to the regular meetings of the council the state of the roads and bridges in the county. There was no evidence as to whether the bridge was much used as a thoroughfare or otherwise.

The only question submitted to the jury, was as to the amount of damages. The Judge who tried the cause charged "that the accident which had occurred to the plaintiff was a most disastrous one, resulting from the undoubted neg-

Corporations—Continued.

ligence of those on whom the duty lay of keeping the bridge in a safe condition, and that the liability of the defendants was a matter of law which he would reserve for the full court."

The jury found a verdict for the plaintiff for \$3,000, and the defendants obtained a rule *nisi* for a new trial, but the grounds on which such rule was obtained did not include misdirection of the judge at the trial.

The Supreme Court of Nova Scotia were equally divided on the argument of the rule *nisi*, two of the learned judges, Rigby and Weatherbe, JJ., being of opinion that the defendants' counsel had agreed in the view propounded by the learned judge at the trial, and had requested the court to determine the question of law first, as if the issue of negligence had been found against defendant, upon sufficient evidence and under a proper charge. They considered the case disposed of by *Walker v. The City of Halifax* (see Corporations, 18) and *McQuarry v. The Municipality of St. Mary's*, 5 R. & G. 493.

McDonald, C.J., and Tompson, J., were of opinion, that the reservation at the trial was a reservation for the opinion of the court of a mixed question of law and fact, and they not only doubted their power to draw inferences of fact at all, but were unable to draw the inference of negligence, the evidence being silent on material points, such as whether the bridge was much or little travelled, and whether the alleged defect ever came to the knowledge of the county officers. See 6 R. & G. 549.

On appeal to the Supreme Court of Canada, Held, Strong, J., dissenting, that the plaintiff was entitled to retain his verdict.

Per Strong, J., dissenting, that there was not sufficient evidence of negligence to warrant the verdict, and the case reserved for the court being on questions of fact as well as of law, a new trial might have been ordered, notwithstanding the objection was not taken either at the trial or in the rule *nisi*.

Appeal dismissed with costs.

Colchester v. Watson.—16th March, 1885.

20. Powers of Bridge Company—Impeding navigation—43 V. c. 61 & 44 V. c. 51 (D.).

See NAVIGATION, 3.

21. North Shore Railway Company—Authority to use streets—Damages—Non-liability of Corporation—16 V. c. 100; 39 V. c. 2, s. 2.

By 16 V. c. 100 (Q.), the North Shore Railway Company was authorized to construct a railway to connect the cities of Quebec and Montreal, with the restriction that the railway was not to be brought within the limits of the city without the permission of the corporation of the city expressed by a by-law.

In July, 1872, the city council, by resolution, had given to the North Shore Railway Company the liberty to choose one of the streets to the north of St. Francis street in exchange for St. Joseph street, which had been at one time chosen for that purpose. In 1874 the city council were informed by the

Corporations—Continued.

company that the line of railway had been located in Prince Edward street, and the company asked the council to take the necessary steps to legalize the line, but the corporation did not take any further action in the matter. In 1875, the company being unable to carry on its enterprise, the railway was transferred to the Province of Quebec by a notarial deed, and the transfer was ratified by 39 V. c. 2 (D.). By that Act the name of the railway was changed and the Legislature authorized the construction of the road to deep water in the port of Quebec. It moreover declared that the railway should be a public work and should be made in such places and in such manner as the Lieutenant-Governor in Council should determine and appoint as best adapted to the general interest of the province. After the passing of this Act the Provincial Government caused the road to be completed, and it crossed part of the city of Quebec from its western boundary by passing through Prince Edward street along its entire length.

The road was completed in 1876. In 1878, L. (the appellant), owner of several houses bordering on Prince Edward street, sued the corporation of the city of Quebec for damages suffered on account of the construction and working of the railway.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the respondent had no right of action against the corporation for the damages which he may have suffered by the construction and working of the railway in question. If the corporation gave the authorization required by 16 V. c. 100, s. 3, there was a complete justification of the Acts complained of. The imposing of terms was discretionary with the corporation. But the corporation never acted on the demand to legalize, and never authorized, the building of the railway through Prince Edward street. If the corporation could have prevented the government from constructing the railway in the streets of the city, in the face of the provisions of 39 V. c. 2, the respondent could also have prevented it. His recourse, if any, was not against the corporation but against the Provincial Government, the owners of the railway.

Appeal dismissed with costs.

Lefebvre v. The Corporation of the City of Quebec.—22nd June, 1885.

22. Agreement between municipality and road company to discontinue use of engine—Construction of.

See AGREEMENT, 13.

23. *Negligence—Liability of corporation for—Defective sidewalk—Lawful use of street—Contributory negligence—Damages.*

In an action against the town of Portland, N. B., for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the windows of her dwelling from the outside of the house, and that in taking a step backward, her foot went into a hole in the sidewalk and she was thrown down and hurt; she also swore that she knew the hole was

Corporations—Continued.

there. There was no evidence as to the nature or extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation.

No motion for non-suit was made, and the jury were directed that if the plaintiff knew the hole was there, it was contributory negligence; but if she believed it was firm ground there was no contributory negligence.

The jury awarded the plaintiff \$300 damages, and a rule nisi for a new trial was discharged.

Held, that there should be a new trial.

Per Ritchie, C.J., and Fournier, J.—That the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the said street as alleged in the declaration, and she was, therefore, not entitled to recover.

Per Ritchie, C.J.—The damages were excessive.

Per Henry, J.—That the plaintiff was lawfully using the street, and there was evidence of negligence on the part of the corporation, but as the question of contributory negligence had not been left to the jury as it should have been there must be a new trial.

Per Taschereau and Gwynne, JJ.—That there was no evidence of negligence to justify the verdict, and a non-suit should have been granted if moved for.

The Town of Portland v. Griffiths.—xi. 333.

24. *Promoters of company—Action against company and promoters for fraudulent misrepresentation—Action ex delicto for deceit—Fraudulent concealment—Prospectus, alleged misstatements in.*

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on a lumber business as partners and had become embarrassed; that they then concocted the scheme of forming a joint stock company; that the sole object of the proposed joint stock company was to relieve the members of the firm from personal liability for debts incurred in the said business and induce the public to advance money to carry on the business; that application was made to the government of Ontario for a charter, and at the same time a prospectus was issued which was set out in full in the bill; that such prospectus contained the following paragraphs among others, which the plaintiffs alleged to be false: 1. The timber limits of the company, inclusive of the recent purchase, consist of 222½ square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber. 2. The interest of the proprietors of the old company in its assets, estimated at about \$140,000 over liabilities, has been transferred to the new company at \$105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company. 3. Preference stock not to exceed \$75,000 will be issued by the company to guarantee 8 per cent. yearly thereon to the year 1880, and over

Corporations—Continued.

that amount the net profits will be divided amongst all the shareholders *pro rata*. 4. Should the holders of preference stock so desire the company binds itself to take that stock back during the year 1880 at par, with 8 per cent. per annum, on receiving six months notice in writing. 5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary, as well as on the preference, stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased.

The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus; that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued, but before the stock certificates were granted; that the assets of the old company were not worth \$140,000, or any sum, over liabilities, but were worthless; and prayed for a rescission of the contract for taking stock, for re-payment of the amount of such stock, and for damages against the directors and promoters for misrepresentation.

There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets.

On the argument three grounds of relief were put forward:—1. Rescission of the contract to subscribe for preference stock; 2. Specific performance of the contract to take back the preference stock during the year 1880 at par; 3. Damages against the directors and promoters for misrepresentation. The company having become insolvent, the plaintiffs put their case principally on the third ground.

Held, affirming the judgment of the court below, (11 Ont. App. R. 836,) that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation,

Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish such a case of fraudulent misrepresentation as to entitle plaintiffs to succeed as for deceit.

Held, also, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued it could not have been in the prospectus, and moreover that the shareholders were in no way damnified thereby, as the new company would have been equally liable for the debt if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind.

Petrie v. The Guelph Lumber Company.—xi. 450.

Corporations—Continued.

25. Municipal corporation—Agreement by to take stock in Railway company and to pay for in debentures—Breach of agreement—Right of Railway Company to sue for special damages.

See DAMAGES, 40.

26. *Sale by Director to Company—Ratification of by-law by Shareholders—Vote of owner of property.*

A director of a joint stock company personally owned a vessel which he wished to sell to the company; he was possessed of a majority of the shares of the company, some of which he assigned to other persons in such numbers as qualified them for the position of directors, which position they accordingly filled. Upon a proposed sale and purchase by the company of the said vessel, the board of directors, including the owner of the vessel, passed a by-law approving of such purchase by the company, and subsequently at a general meeting of the shareholders, at which the said owner and those to whom he had transferred the portions of his stock were present and voted, a resolution was passed confirming the said by-law, which resolution was opposed by a number of the shareholders representing nearly one-half of the total stock of the company.

Held, reversing the decision of the Court of Appeal, (11 Ont. App. R. 205,) that the board of directors had no power to pass the said by-law, and under the circumstances the resolution of the shareholders confirming the by-law was invalid.

Beatty v. The North Western Transportation Company.—xii. 598.

[The judgment in this case was reversed by the J. C. of the Privy Council—See 12 App. Cases 589.]

27. Municipal corporation—By-law guaranteeing cost of expropriation by railway *ultra vires*—Injunction.

See RAILWAYS AND RAILWAY COMPANIES, 18.

28. *Joint stock company—Contributories—Subscription for stock—Payment by services.*

The Act of Incorporation of a joint stock company provided "that no subscription for stock should be legal or valid until ten per cent. should have been actually and *bona fide* paid thereon." C. gave to the manager of the company a power of attorney to subscribe for him ten shares in the company, such power of attorney containing these words: "and I herewith enclose ten per cent. thereof, and ratify and confirm all that my said attorney may do by virtue thereof." The ten per cent. was not, in fact, enclosed, but the amount was placed to the credit of C. in the books of the company, and a certificate of stock issued to him which he held for several years. The company having

Corporations—Continued.

failed, proceedings were taken to have C. placed on the list of contributories, in which proceedings he gave evidence to the effect, that the sum to his credit was for professional services to the company, he having been appointed a local solicitor, and there had been an arrangement that his stock was to be paid for by such services.

Held, affirming the judgment of the court below, Henry, J., dissenting, that C. was rightly placed on the list of contributories.

Caston's Case.—xii. 644.

**29. Joint stock company—Misrepresentation by promoters of—
Action of individual shareholders—Delay in bringing
action—Parties.**

Individual shareholders in a joint stock company cannot bring an action against the promoters for damages caused by alleged misrepresentations by the latter as to the prospects of the company when formed, the injury, if any, being an injury to the company, not to the respective shareholders. (Strong, J., dissenting). If the shareholders could bring such action a delay of four years, during which they suffered the business of the company to go on with full knowledge of the alleged misrepresentations, would disentitle them to relief. (Strong, J., dissenting.)

Beatty v. Neelon.—xiii. 1.

**30. Powers of directors—Assignment for benefit of creditors—
Description of property—Change of possession—R. S. O.
c. 119, s. 5—Interpleader issue—Appeal from judgment on.**

The decision of a judge of the High Court of Justice (which by section 28 of the Judicature Act is the decision of the court) on an interpleader issue to try the title to property taken under execution on a final judgment in the suit in which it is issued, is not an interlocutory order within the meaning of that expression in section 85 of the Judicature Act, or if it is it is such an order as was appealable before the passing of that Act, and in either case it is appealable now to the Court of Appeal for Ontario.

An assignment by the directors of a joint stock company of all the estate and property of the company to trustees for the benefit of creditors is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.

Quere. Is such an assignment within the provisions of the Chattel Mortgage Act of Ontario, R. S. O. c. 119?

Where such an assignment was made, and the property was formally handed over by the directors to the trustees, who took possession and subsequently advertised and sold the property under the deed of assignment,

Held, that if the assignment did come within the terms of the Act its provisions were fully complied with, the deed being duly registered and there being an actual and continued change of possession as required by section 5.

Corporations—Continued.

In such deed of assignment the property was described as "all the real estate, lands, tenements and hereditaments of the said debtors (company) whatsoever and wheresoever, of or to which they are now seized or entitled, or of or to which they may have any estate, right or interest of any kind or description, with the appurtenances, the particulars of which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock in trade, goods, chattels, . . . and all other the personal estate and effects whatsoever and wheresoever, whether upon the premises where the debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever.

The schedule annexed specifically designated the real estate and included the foundry, erections and buildings thereon erected, and all articles such as engines, etc., in or upon said premises.

Held, that this was a sufficient description of the property intended to be conveyed to satisfy the section 23 of R. S. O. c. 119; *McCall v. Wolf* (13 C. S. C. R. 130), approved and distinguished.

But see now 48 V. c. 26, s. 12, passed since this case was decided.

Hovey v. Whiting.—xiv. 515.

31. Joint stock company—31 V. c. 25 (P.Q.)—Action for calls—Subscriber before incorporation—Allotment—Non-liability.

P. signed a subscription list undertaking to take shares in the capital stock of a company to be incorporated by letters patent under 31 V. c. 25 (P.Q.), but his name did not appear in the notice applying for letters patent, nor as one of the original incorporators in the letters patent incorporating the company. The directors never allotted shares to P. and he never subsequently acknowledged any liability to the company. In an action brought by the company against P., for \$10,000 alleged to be due by him on 100 shares in the capital stock of the company,

Held, affirming the judgment of the court below, that P. was not liable for calls on stock.

The Magog Textile and Print Co. v. Price.—xiv. 664.

32. Action on bond against sureties of defaulting clerk of municipality—Defence—No seals attached when sureties signed.

See BOND, 5.

33. Municipal debentures—Future conditions—Municipal Code, Art. 982.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada, M. L. R. 2 Q. B. 160, that a debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to said debenture, free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the

Corporations—Continued.

future keeping up of the road, etc. Art. 962, Municipal Code. Fournier, J., dissenting.

Parish of St. Césaire v. McFarlane.—March 14th, 1887—xiv. 788.

34. Estoppel—Action by ratepayer—Improper construction of municipal work—Ratepayer a contractor—Acceptance of surplus money.

A ratepayer of a municipality cannot maintain an action, on behalf of himself and the other ratepayers, against the municipality for the improper construction of a drain authorized by by-law when such ratepayer has himself been a contractor for a portion of the work and has received his share of the money voted for the work in excess of the amount expended.

Judgment of the Court of Appeal for Ontario, 13 Ont. App. R. 58, affirmed.

Dillon v. The Township of Raleigh.—March 15th, 1887—xiv. 789.

35. Municipal by-law—Sale of meat—Municipal Act, 1883, ss. 497 and 503; 50 V. c. 29, s. 29, Ont.—Quantity—Time and place—License.

See LICENSE, 7.

36. Purchase of shares in Mutual Building Society declared forfeited for non-payment of dues—Litigious rights—Arts. 1582, 1583, 1584, C. C.

See LITIGIOUS RIGHTS.

37. Municipal Council—Powers of—Improvement of roads—Procès verbal homologated—Effect of Arts. 100, 451, 705, M. C. (P.Q.)—Appeal—R. S. C. c. 135, s. 29 (b).

Where a *procès verbal* of a municipal council directing improvements to be made on a portion of road situated within the municipality has been duly homologated, it cannot subsequently be set aside by an incidental procedure, but, like a by-law, it can only be attacked by a direct procedure as indicated in the Municipal Code (P.Q.) Arts. 100, 461. *Parent v. Corporation of St. Sauveur*, 2 Q. L. R. 258, approved.

By a *procès verbal* made by the municipal council of Ste. Anne du Bout de L'Isle a portion of the road fronting the land of one R. was ordered to be improved by raising and widening it. Upon R.'s refusal to do the work the council had it performed, paid \$200 for it and subsequently sued R. for the said \$200.

The Court of Queen's Bench, P.Q., on appeal affirmed a judgment in favour of the municipal council for that amount.

On appeal to the Supreme Court it was :

Corporations—Continued.

Held, per Fournier, Henry and Gwynne, JJ., (Strong and Taschereau, JJ., dissenting, and Ritchie, C.J., expressing no opinion on the point), that although the matter in controversy did not amount to \$2,000, yet, as it related to a charge on the appellant's land whereby his rights in future might be bound, the case was appealable. R. S. C. c. 185, s. 29.

Reburn v. La Corporation de la Paroisse de Ste. Anne du Bout de L'Ile. —xv. 92.

38. Railway company—Sparks from engine—Negligence—Examination for discovery—Officers of corporation, locomotive superintendent and locomotive foreman, officers who may be examined. R. S. O. 1877, c. 50, s. 136.

See RAILWAYS AND RAILWAY COMPANIES, 40.

39. *Construction of street railway—By-law—Agreement—Notice precedent to assuming ownership by corporation—Arbitrators—Appointment of by court.*

The Quebec Street Railway Company were authorized under a by-law passed by the corporation of the city of Quebec and an agreement executed in pursuance thereof to construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that at the expiration of twenty years (from the 9th February, 1865) the corporation might, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said railway upon payment, etc., of its value, to be determined by arbitration, together with ten per cent. additional.

Held, reversing the judgments of the courts below, Fournier, J., dissenting, that the company were entitled to a full six months notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and therefore a notice given in November, 1884, to the company that the corporation would take possession of the railway in six months thereafter was bad.

Per Strong and Henry, JJ.—That the court had no power to appoint an arbitrator or valuator to make the valuation provided for by the agreement after the refusal by the company to appoint their arbitrator. Fournier, J., *contra*.

Quebec Street Ry. Co. v. City of Quebec.—xv. 164.

40. *Municipal corporation—By-law—Voting by ratepayers on—Casting vote by returning officer—R. S. O. (1877), c. 174, s. 8. 286-7.*

In case of a tie in voting on a municipal by-law there is no authority to the returning officer to give a casting vote, s. 152 of R. S. O. (1877) c. 174 not applying to such a vote.

Canada Atlantic Ry. Co. v. Township of Cambridge.—xv. 219.

Corporations—Continued.

41. Act of incorporation of company—Vendor to company estopped from questioning validity of, after judgment on litation and on report of distribution.

See SALE OF LANDS, 26.

42. Municipal corporation—Public highway—Construction of crossing—Elevation above end of street—Negligence.

See MUNICIPAL CORPORATION, 10.

43. *Foreign corporation—Telegraph company—Doing business in Canada—Exclusive right—Contract for—Restraint of trade—Public interest.*

In 1869 the E. & N. A. Ry. Co. owning the road from St. John, N. B., westward to the United States boundary, made an agreement with the W. U. Tel. Co. giving the latter the exclusive right for 99 years to construct and operate a line of telegraph over its road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree of the Equity Court of New Brunswick to the St. J. & M. Ry. Co., which company, in 1888, leased it to the N. B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Tel. Co. under the said agreement, and has been continued ever since without any new agreement being made with the St. J. & M. Ry. Co. or the N. B. Ry. Co. The W. U. Tel. Co. is an American company, incorporated by the State of New York, for the purpose of constructing and operating telegraph lines in the state. Its charter neither allows it to engage, nor prohibits it from engaging, in business outside the state. In 1888 the C. P. Ry. Co. completed a road from Montreal to St. John, a portion of it having running powers over the line of the N. B. Ry. Co., on which the W. U. Tel. Co. had constructed its telegraph line. The N. B. Ry. Co. having given permission to the C. P. R. to construct another telegraph line over the same road, the W. U. Tel. Co. applied for and obtained an injunction to prevent its being built. On appeal to the Supreme Court of Canada from the decree of the Equity Court granting the injunction :

Held, 1. That the agreement made in 1869 between the E. & N. A. Ry. Co. is binding on the present owners of the road.

2. That the contract made with the W. U. Tel. Co. was consistent with the purposes of its incorporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations.

3. The exclusive right granted to the W. U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade.

Held, *per* Gwynne, J., dissenting, that the comity of nations does not require the courts of the country to enforce, in favor of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a

Corporations—Continued.

domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land.

Canadian Pacific Railway Co. v. Western Union Tel. Co.—xvii. 151.

44. Corporation—Contract of—Seal—Performance—Adoption—Municipality—By-law—Manitoba Municipal Act, 1884, s. 111.

A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. *Ritchie, C.J., and Strong, J., dissenting.*

In section 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. *Ritchie, C.J., and Strong, J., dissenting.*

Bernardin v. The Municipality of North Dufferin.—xix. 581.

45. Corporation publisher and proprietor of newspaper—Manitoba Act, 50 V. c. 23—Deposit of affidavit or affirmation—Who shall make—Contents.

See LIBEL, 6.

46. Road Co.—Collector of tolls—Negligence—Liability of company.

See NEGLIGENCE, 87.

47. Joint stock company—Action for calls on increased capital—Calls and by-law not in conformity with 31 V. c. 25 (P.Q.) ss. 11, 17, 19, 20.

By s. 11, 31 V. c. 25 (P.Q.) it is provided that "no by-law for increasing or decreasing the capital of the company shall have any force or effect whatever until it shall have been sanctioned by a vote of not less than two-thirds in amount of the shareholders at a general meeting of the company, duly called for considering the same, and afterwards confirmed by supplementary letters patent."

In virtue of the above provisions on the 9th March, 1875, at a meeting of the board of directors of the St. John Stone Chinaware Company a by-law was passed increasing the capital stock of the company by the issue of 250 additional shares of \$200 each, payable by monthly instalments of ten per cent. each."

Corporations—Continued.

At the general meeting of the stockholders held on the 8th June, 1875, for the election of directors and other business, the by-law passed by the directors for the increased capital was confirmed. There was no evidence as to whether the by-law was sanctioned by two-thirds in amount of the shareholders. There was no day appointed for the payment of the calls, and the books of the company contained no other entry relating to the calls for the increased stock than the minutes of the meeting of the board of directors of the 9th March, 1875, and of the general meeting of the 8th June, 1875, aforesaid. In an action brought by the assignee of the company against W., an original stockholder and director, for calls of 20 shares of new stock, it was

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada, that there was no evidence of calls for the payment of the shares in question having been duly made, and therefore W. was not liable.

Per Fournier and Henry, JJ.—There was no evidence that the by-law had been sanctioned by a vote of not less than two-thirds in amount of the shareholders at a general meeting of the company duly called for considering the same, and on that ground also the appeal should be dismissed.

Present: Ritchie, C.J., and Fournier, Henry, Taschereau and Gwynne, JJ.

Knight v. Whitfield.—22 C. L. J. 15—16th Nov., 1885.

48. *Public Company—Act of incorporation—Forfeiture of—44 V. c. 61 (D.)—Attorney-General of Canada—Information—R. S. C. c. 21, s. 4—Scire Facias—Form of proceedings—Arts. 997 et seq. C. C. P.—Subscription to capital stock—Condition precedent.*

The appellant company by its act of incorporation, 44 V. c. 61 (D.) was authorized to carry on business provided \$100,000 of its capital stock were subscribed for, and thirty per cent. paid thereon, within six months after the passing of the Act, and the Attorney-General of Canada having been informed that only \$60,500 had been *bona fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by G. in trust, who subsequently surrendered a portion of it to the company, and that the thirty per cent. had not been truly and in fact paid thereon, sought at the instance of a relator by proceedings in the Superior Court for Lower Canada to have the company's charter set aside and declared forfeited.

Held, affirming the judgment of the court below :

1. That this being a Dominion Statutory charter proceedings to set it aside were properly taken by the Attorney-General of Canada.

2. That such proceedings taken by the Attorney-General of Canada under Arts. 997 et seq. C. C. P. if in the form authorized by those articles are sufficient and valid though erroneously designated in the pleadings as a *scire facias*.

3. That the *bona fide* subscription of \$100,000 within six months from the date of the passing of the Act of incorporation, and the payment of the 30 per cent. thereon, were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not

Corporations—Continued.

been *bona fide* and in fact complied with within such six months the Attorney-General of Canada was entitled to have the company's charter declared forfeited. Gwynne, J., dissenting.

Dominion Salvage and Wrecking Company v. The Attorney-General of Canada. —xxi. 72.

49. *Statute—Application of—R. S. O. (1887), c. 159—53 V. c. 42—Application to company incorporated by special charter—Collection of tolls—Maintenance of road—Injunction.*

The provisions of the general Road Companies Act of Ontario, R. S. O. (1887), c. 159, as amended by 53 V. c. 42, relating to tolls and repair of roads, apply to a company incorporated by special Acts, and on the report of an engineer as provided by the General Act that the road of such company is out of repair it may be restrained from collecting tolls until such repairs have been made.

Judgment of the Court of Appeal for Ontario on motion for interim injunction (19 Ont. App. R. 234) over-ruled and that of the Divisional Court (21 O.R. 607) approved.

The Attorney-General v. The Vaughan Road Company.—13th Dec., 1892, xxi.

Corrupt Practice—Dominion election—Free railway ticket—Loan for travelling expenses—Intent.

See ELECTION, 44.

2. Promise by candidate to procure employment for voter—Evidence—Corroboration—Finding of trial judges.

See ELECTION, 45.

Costs—Charged against administrator personally—Where misconduct.

See EXECUTORS, 7.

2. In appeal.

See PRACTICE OF SUPREME COURT, 33-50, 111.

3. *Railway company—Lands taken for railway purposes—Arbitration—Award—Matters considered by arbitrators.*

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same which offer was not accepted and the matter was referred to arbitration under the Cons. Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land, in addition to the money payment,

Costs—Continued.

and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer.

Held, affirming the judgment of the Court of Appeal, and the judgment of the Divisional Court, 5 O. R. 674, Gwynne, J., dissenting, that under the circumstances neither party was entitled to costs.

Appeal dismissed with costs.

Ontario and Quebec Railway Co. v. Philbrick.—9th April, 1886—xii. 288.

4. Contempt of court—R. S. C. c. 135, s. 24 (a)—Judgment not final—Party appellant led into error by action of the court below—Appeal quashed without costs.

Ellis v. Baird.—xvi. at pp. 149, 150 & 155.

See JURISDICTION, 53.

5. Contract with Crown—Certificate of engineer—Condition precedent—Reference to arbitration under 31 V. c. 12—Costs of proceedings refused.

See CONTRACT, 35.

6. Of execution creditor—Lien for—Assignment for benefit of creditors—Extent of costs—48 V. c. 26, s. 9 (O.)—49 V. c. 25, s. 2 (O.).

See ASSIGNMENT, 13.

7. Intestate estate—Distribution—Paid out of estate—Order of court below—Interference with.

See DISTRIBUTION OF ESTATE.

8. Solicitor's bill—Reference to taxing master—Procedure—Appeal—Jurisdiction.

See SOLICITOR AND CLIENT, 7.

9. *By-law—Appeal as to costs—Jurisdiction—Supreme and Exchequer Courts Act, s. 24.*

After the rendering of a judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:—

Costs—Continued.

Held, that the only matter in dispute between the parties being a mere question of costs, the court would not entertain the appeal. Supreme and Exchequer Courts Act, s. 24.

Moir v. The Corporation of the Village of Huntingdon.—xix. 363.

10. *Bill of—Order for taxation—R. S. O. 1887, c. 147, s. 42—Appeal—Jurisdiction.*

Judgment having been recovered in an action brought against school trustees, a ratepayer of the district applied to a judge of the H. C. of J. for Ontario under s. 42 of c. 147 of the R. S. O. 1887, to tax the bill of the solicitor of the plaintiff.

Held, *per* Ritchie, C.J., and Patterson, J., affirming the judgment of the Court of Appeal for Ontario, that a ratepayer is not entitled to an order for taxation under said section.

Held, also, *per* Ritchie, C.J., and Patterson, J., that the matter of taxation of costs was one in which the Supreme Court should not interfere.

Held, further that there was no jurisdiction to entertain the appeal.

McGugan v. McGugan.—xxi. 267.

See also JURISDICTION, 101.

11. *Proceedings before Supreme and Exchequer Courts of Canada—Solicitor and client—Costs of—Quantum meruit—Parol evidence—Art. 3597, R. S. Q.*

In proceedings before the Supreme and Exchequer Courts, there being no tariff as between attorney and client, an attorney has the right to establish the *quantum meruit* of his services by oral evidence in an action for his costs.

Paradis v. Bosse.—xxi. 419.

12. *Solicitors—Action on Bill of Costs—Set Off—Mutual Debts—Special Services—Retainer.*

Held, affirming the judgment of the Court of Appeal for Ontario, that in an action by a firm of attorneys for costs due from clients the defendants cannot set off against the plaintiff's claim a sum paid by one of them to one of the attorneys for special services to be rendered by him there being no mutuality and the payment not being for the general services covered by the retainer to the firm.

Held, *per* Taschereau, J.—A decision of the Court of Appeal affirming the judgment of the Divisional Court which refused to allow such set-off is not a final judgment from which appeal will lie to the Supreme Court of Canada.

McDougall v. Cameron, Bickford v. Cameron.—xxi. 379.

Counsel.—Right to recover fees—Agreement for.

See PETITION OF RIGHT, 5.

At hearing.

Right to begin.

When appellant in person.

Fees in appeal.

See PRACTICE OF SUPREME COURT, 51-59.

Counts.—Misjoinder of, in an indictment.

See CRIMINAL APPEAL, 2.

County Court.—Of Halifax—Prohibition to restrain trial of cause by.

See PROHIBITION, 4.

2. Judge of—No power on a scrutiny under Canada Temperance Act to enquire into corrupt acts.

See CANADA TEMPERANCE ACT, (1879), 7.

3. Inquiry into civic affairs by judge of County Court—R. S. O. 1887, c. 184, s. 477—Prohibition.

See PROHIBITION, 7.

Court House.—Establishment of County Court House and jail—Right to remove from shire town—R. S. N. S. 5th ser. c. 20, s. 1—49 V. c. 11.

See MUNICIPAL CORPORATION, 22.

Court of Chancery, Ont.—Transfer of action to, under Adm. Just. Act.

See MORTGAGE, 10.

2. Powers of in Ejectment—R. S. Ont, c. 40, s. 87.

See POSSESSION, 5.

Court of Review, P. Q.

See REVIEW, COURT OF.

Covenant.—In mortgage deed.

See MORTGAGE, 2.

Criminal Appeal—Indictment—Delegation of authority by Attorney-General—32 & 33 V. c. 29, s. 28—Obtaining money under false pretences.

On an indictment, containing four counts for obtaining money by false pretences, was endorsed: "I direct that this indictment be laid before the grand jury.

MONTREAL, 6th October, 1880.

"L. O. Loranger, Attorney-General; by J. A. Mousseau, Q.C.; C. P. Davidson, Q.C."

Messrs. Mousseau and Davidson were the two counsel authorized to represent the Crown in all the criminal proceedings during the term.

A motion supported by affidavit was made to quash the indictment on the ground *inter alia*, that the preliminary formalities required by s. 28 of 32 & 33 V. c. 29, had not been observed. The Chief Justice allowed the case to proceed, intimating that he would reserve the point raised, should the defendant be found guilty. The defendant was convicted.

Held, on appeal, reversing the judgment of the Court of Queen's Bench, that under 32 & 33 V. c. 29, s. 28, the Attorney-General could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise to direct that a bill of indictment for obtaining money by false pretences be laid before the grand jury; and it being admitted that the Attorney-General gave no directions with reference to this indictment, the motion to quash should have been granted, and the verdict ought to be set aside.

Abrahams v. The Queen.—vi. 10.

2. Indictment—Misjoinder of counts—Manslaughter—Evidence.

An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th November, 1881; the other with manslaughter of the said M. J. T. on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death (17th October preceding), the prisoner had knocked his wife down with a bottle; she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.

The following questions were reserved, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased prior to

Criminal Appeal—Continued.

the 10th November or the 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment?

Held, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received, and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner.

Theal v. The Queen.—vii. 397.

3. *Larceny—Unstamped promissory note—Valuable security—32 & 33 V. c. 21 (D).*

S. was indicted, tried and convicted for stealing a note for the payment and value of \$258.33, the property of A. McC. and another. The evidence showed that the promissory note in question was drawn by A. McC. and C. R., and made payable to S.'s order. The said note was given by mistake to S., it being supposed that the sum of \$258.33 was due to him by the drawers, instead of a less sum of \$175.00. The mistake being immediately discovered, S. gave back the note to the drawers, unstamped and undorsed, in exchange for another note of \$175.00. An opportunity occurring, S. afterwards, on the same day stole the note; he caused it to be stamped, indorsed it, and tried to collect it.

Held, on appeal, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that S. was not guilty of larceny of "a note" or of "a valuable security" within the meaning of the statute, and that the offence of which he was guilty was not correctly described in the indictment.

Scott v. The Queen.—ii. 349.

4. *Witness—Contradiction of—New trial.*

The prosecutrix, in an indictment for rape, was asked in cross-examination, after she had declared she had previously had connection with a man, other than the prisoner, whether she remembered having been in the milk-house of G. with two persons named M., one after the other.

Held, that the witness might have objected, or the judge might, in his discretion, have told the witness she was or she was not bound to answer the question; but the court ought not to have refused to allow the question to be put because the counsel for the prosecution objected to the question.

Held, also, that since the passing of 32 & 33 V. c. 20 s. 80, repealing so much of c. 77, of Cons. Stat. L. C., as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32 & 33 V. c. 36, repealing s. 68 of c. 77, Cons. Stat. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial.

Laliberte v. The Queen.—i. 117.

5. No right of appeal when conviction unanimous.

See JURISDICTION, 8.

Criminal Appeal—Continued.**6. Forgery—Uttering forged order for payment of money—Trying for an offence other than the one for which prisoner extradited.**

The prisoner Cunningham was indicted and tried at the October Term, 1884, of the Supreme Court of Nova Scotia at Halifax, Macdonald, C.J., presiding. There were three counts in the indictment, charging—

1. That the said James Cunningham did feloniously offer, utter, dispose of and put off, knowing the same to be forged, a certain check or order for the payment of money, which said forged order is as follows, that is to say—
No. E. 48460. Halifax, N. S., February 18th, 1884.

Merchants' Bank of Halifax:

Pay William McFatrige, or order, two hundred and twenty-four dollars and seventeen cents (\$224.17.)

(Sgd.) LONGARD BROS.

And endorsed as follows: "W. McFATRIGE."

With intent to defraud.

2. That the said James Cunningham afterwards, to wit, on the day and year aforesaid, having in his custody and possession a certain other order for the payment of money, which said last mentioned order is as follows, that is to say—

No. E. 48460.

Halifax, N.S., February 18th, 1884.

Merchants' Bank of Halifax:

Pay William McFatrige, or order, two hundred and twenty-four dollars and seventeen cents (\$224.17.)

(Sgd.) LONGARD BROS.

He, the said James Cunningham, afterwards, to wit, on the day and year last aforesaid, at Halifax aforesaid, feloniously did forge on the back of said last-mentioned order a certain indorsement of said order for the payment of money, which said forged indorsement is as follows, that is to say, "W. McFatrige," with intent to defraud.

3. That the said James Cunningham afterward, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off, a certain other forged order for the payment of money, which forged order is as follows that is to say—

No. E. 48460.

Halifax, N.S., February 18th, 1884.

Merchants' Bank of Halifax:

Pay William McFatrige, or order, two hundred and twenty-four dollars and seventeen cents (\$224.17.)

(Sgd.) LONGARD BROS.

And indorsed "W. McFATRIGE."

With intent thereby then to defraud.

Counsel for the prisoner, before the jury were sworn, pleaded to the jurisdiction of the court on the ground that the indictment charged an offence or offences different from that for which the prisoner was extradited, to which plea the attorney general demurred. Judgment was pronounced sustaining

Criminal Appeal—Continued.

the demurrer and the trial proceeded. The prisoner was convicted on the first and third counts of the indictment, and acquitted on the second.

At the close of the trial counsel for the prisoner renewed his application, and the C. J., agreed to reserve for the opinion of the judges and submitted:—

(1) Whether the prisoner was indicted and tried for another and different offence, or other and different offences, than that for which he was extradited at the instance of the Government of Canada; and if so, whether the court had jurisdiction to try and convict the prisoner of such offence or offences.

(2) Whether the evidence on the part of the Crown, as reported herewith, is sufficient to sustain a conviction on the first and third counts of the indictment or on either of those counts. The papers put in evidence on the trial to be considered and read as part of the case.

The majority of the Supreme Court of Nova Scotia (Rigby, Smith and Thompson, JJ., McDonald, C.J., and Weatherbe, J., dissenting), **Held**, that the prisoner was properly convicted on the third count. (*See 6 R. & G. 81.*)

On appeal to the Supreme Court of Canada, **Held**, *Per Fournier, Henry and Taschereau, JJ.*, (Ritchie, C.J., and Strong, J., dissenting), that evidence of the uttering of a forged indorsement of a negotiable check or order is insufficient to sustain a conviction on a count of an indictment charging the uttering of a forged check or order. On the second question reserved, therefore, the judgment of the court below should be reversed and the prisoner ordered to be discharged.

Per Ritchie, C.J.—The question raised by the demurrer was not properly before the Court in Appeal, the court below having been unanimous with respect to it.

Per Strong, J.—The court below rightly held, on the authority of *Rez. v. Faderman* (Den. C. C. 572), that the question raised by the demurrer was not properly before the court, the Chief Justice having given judgment on the demurrer overruling it at the trial. Moreover, there was nothing in the law under which the prisoner was extradited to prevent the court from trying him for any offence for which he was, according to the law of the Dominion, justiciable before it.

Appeal allowed.

Queen v. Cunningham.—16th March, 1885.

7. Indictment for perjury—Evidence of special facts—Admissibility of.

D., in answering to *faits et articles* on the contestation of a *saisie arrêt*, or attachment, stated, among other things, "1st, that he, D., owed nothing for his board; 2nd, that he, D., from about the beginning of 1880 to towards the end of the year 1881, had paid the board of one F., the rent of his room, and furnished him with all the necessaries of life with scarcely any exception; 3rd, that he, F., during all that time, 1880 and 1881, had no means of support whatever." D. being charged with perjury, in the assignments of perjury and

Criminal Appeal—Continued.

in the negative averments the facts sworn to by D. in his answers were distinctly negatived in the terms in which they were made.

Held, that under the general terms of the negative averments it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on *faits et articles*, and the conviction could not be set aside because of the admission of such proof. Even if the evidence was inadmissible there being other charges in the same count which were pleaded to, a judgment given on a general verdict of guilty on that count would be sustained.

Downie v. The Queen.—xv. 358.

8. *Procedure—Indictment for rape—Conviction for assault with intent—Attempt—R. S. C. c. 174, s. 183—Punishment.*

An assault with intent to commit a felony is an attempt to commit such felony within the meaning of s. 183 of R. S. C. c. 174.

On an indictment for rape a conviction for assault with intent to commit rape is valid.

On such conviction the prisoner was held properly sentenced to imprisonment under R. S. C. c. 162, s. 88.

John v. The Queen.—xv. 384.

9. *Felony—Jury attending church—Preacher's remarks—Influence on jury—Expert testimony—Admissibility.*

In the course of a trial for murder by shooting the jury attended church in charge of a constable, and the clergymen directly addressed them, referring to the case of a man hung for murder in P. E. I., and urging them if they had the slightest doubt of the guilt of the prisoner they were trying, to temper justice with equity. The prisoner was convicted.

Held, affirming the judgment of the Court of Crown Cases reserved in Nova Scotia, that, although the remarks of the clergyman were highly improper, it could not be said that the jury were so influenced by them as to affect their verdict.

A witness was called at the trial to give evidence as a medical expert and in answer to the crown prosecutor he said, "there are *indicia* in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement and no medical witnesses were called by the prisoner to confute it. The witness then stated the distance from the murdered man at which the shot must have been fired in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body.

Held, Strong and Fournier, JJ., dissenting, that by his preliminary statement, the witness had established his capacity to speak as a medical expert, and it not having been shown by cross-examination, or other testimony, that there were no such *indicia* as stated, his evidence as to the distance at which the shot was fired was properly received.

Preeper v. The Queen.—xv. 401.

Criminal Appeal—Continued.

10. *Crown cases reserved—R. S. C. c. 174, ss. 246 & 259—Construction of—Juror—Personation of—Irregularity—Cured by verdict.*

B., having been found guilty of feloniously having administered poison with intent to murder, moved to arrest judgment on the ground that one of the jurors who had tried the case had not been returned as such. The general panel of jurors contained the names of Joseph Lamoureux and Moïse Lamoureux. The special panel for the term of the court, at which the prisoner was tried, contained the name of Joseph Lamoureux. The sheriff served Joseph Lamoureux's summons on Moïse Lamoureux, and returned Joseph Lamoureux as the party summoned. Moïse Lamoureux appeared in court and answered to the name of Joseph, and was sworn as a juror without challenge when B. was tried. On a reserved case it was

Held, *per* Ritchie, C.J., and Taschereau and Gwynne, JJ., that the point should not have been reserved by the judge at the trial, it not being a question arising at the trial within the meaning of R. S. C. c. 174, s. 259.

Held, also, *per* Taschereau and Gwynne, JJ., affirming the judgment of the Court of Queen's Bench, that assuming the point could be reserved, R. S. C. c. 174, s. 246 clearly covered the irregularity complained of. Strong and Fournier, JJ., dissenting.

Brisebois v. The Queen.—xv. 421.

11. *Assault on constable in discharge of duty—Serving summons—Trial of indictment—Witness—Competency of wife of defendant—R. S. C. c. 162, s. 34; R. S. C. c. 174, s. 216.*

An assault on a constable attempting to serve a summons issued by a magistrate on information charging violation of the Canada Temperance Act is an assault on a peace officer in the due execution of his duty and indictable under R. S. C. c. 162, s. 34.

On the trial of an indictment for such assault the wife of the defendant is not a competent witness on his behalf.

McFarlane v. The Queen.—xvi. 398.

12. *Criminal law—Indictment—Name of third person—Alias dictus—Proof of names—Variance.*

Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all.

J. was indicted for the murder of A. J., otherwise called K. K. On the trial it was proved that the deceased was known by the name of K. K., but there was no evidence that she ever went by the other name.

Held, affirming the judgment of the court below, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter.

Jacobs v. The Queen.—xvi. 433.

Criminal Appeal—Continued.

13. *Error—Writ of—On what founded—Right of Crown to stand aside jurors when panel of jurors has been gone through—Question of law not reserved at trial—Criminal Procedure Act—R. S. C. c. 174, s. 164, 256 & 266.*

When a panel had been gone through and a full jury had not been obtained the Crown on the second calling over the panel was permitted, against the objection of the prisoner, to direct eleven of the jurymen on the panel to stand aside a second time, and the judge presiding at the trial was not asked to reserve and neither reserved nor refused to reserve the objection. After conviction and judgment a writ of error was issued.

Held, *per* Taschereau, Gwynne and Patterson, JJ., affirming the judgment of the court below, that the question was one of law arising on the trial which could have been reserved under s. 259 of c. 174, R. S. C., and the writ of error should, therefore, be quashed. S. 266 c. 174, R. S. C.

Per Ritchie, C.J., and Strong and Fournier, JJ.—That the question arose before the trial commenced and could not have been reserved, and as the error of law appeared on the face of the record the remedy by writ of error was applicable. (*Brisebois v. The Queen*, 15 Can. S. C. R. 421 referred to).

Per Ritchie, C.J., and Strong, Fournier and Patterson, JJ., that the Crown could not without showing cause for challenge direct a juror to stand aside a second time. S. 164 c. 174, R. S. C. (*The Queen v. Lacombe*, 18 L. C. Jur. 259 overruled).

Per Gwynne, J.—That all the prisoner could complain of was a mere irregularity in procedure which could not constitute a mis-trial.

Morin v. The Queen.—xviii. 407.

14. Contempt of court is a criminal matter and not appealable unless it can be brought within s. 68 of the Supreme and Exchequer Courts Act (R. S. C. c. 135).

See CONTEMPT, 4.

Cross Appeal.

See PRACTICE OF SUPREME COURT, 52, 53, 60-63.

Crown—Right of, to plead prescription.

See PETITION OF RIGHT, 3.

2. Not liable for tort.

See PETITION OF RIGHT, 1, 10, 11.

3. Liability of, for breach of contract.

See PETITION OF RIGHT, 3.

Crown—Continued.

4. Forfeiture and penalties, right to recover by.

See PETITION OF RIGHT, 1.

5. Non-liability on parliamentary contract.

See PETITION OF RIGHT, 12.

6. Liability on departmental contract.

See PETITION ON RIGHT, 18.

7. Non-liability for non-feasance or misconduct of its servants.

See PETITION OF RIGHT, 10, 11.

8. Not a common carrier.

See PETITION OF RIGHT, 10, 11.

9. Petition of right to recover damages for breach of agreement by.

See PETITION OF RIGHT, 15, 17.

10. Representation by agent of.

See PETITION OF RIGHT, 17.

11. Lien for timber dues.

See PETITION OF RIGHT, 18.

12. Property in Quebec North Shore Turnpike Roads.

See ROAD.

13. Interest on profits awarded suppliant, refused.

See INTEREST, 6.

14. Property held by, not liable to taxation.

See ASSESSMENT AND TAXES, 12, 24.

15. *Insolvent bank—Winding-up proceedings—Priority of Crown as simple contract creditor—Estoppel—Acceptance of dividends by Crown not waiver—45 V. c. 23.*

The Bank of Prince Edward Island became insolvent, and a winding-up order was made on the 19th June, 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of \$93,494.20, being part of the public moneys of Canada, which had been deposited by several departments of

Crown—Continued.

the government to the credit of the Receiver General. The first claim filed by the Minister of Finance at the request of the respondents (liquidators of the bank), did not specially notify the liquidators that her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of \$65,426.95. On that day the respondents were notified that her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay in full her Majesty's claim. The following objection to the claim was allowed by the Supreme Court of Prince Edward Island, viz: "That her Majesty, the Queen, represented by the Minister of Finance, and the Receiver General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company."

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, 1. That the Crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 V. c. 28.

2. That the Crown had not waived its right to be preferred in this case by the form in which the claim was made, and by the acceptance of two dividends.

The Queen v. The Bank of Nova Scotia.—xi. 1.

16. Grant by Province of B. C. of lands set apart for C. P. Ry.—
Illegality of—Title in Crown for Dominion of Canada.

See PUBLIC LANDS, 2.

17. Right of, to set up statute of limitations as a defence—*Man-
damus*.

See LIMITATIONS, 10.

18. Bond to, for faithful execution of duty by government official—
Evidence of execution—Proximate cause of acceptance—
Estoppel.

See EVIDENCE, 35.

19. Contract for public work—Final estimate of chief engineer—
Changes in work not included—New contract—Power of
engineer to make.

See CONTRACT, 35.

Crown—Continued.

20. Crown lands, letters patent for—Setting aside—Error and providence—Superior title.

See LETTERS PATENT, 2.

21. *Prerogative of—Insolvent bank—Assets—R. S. C. c. 120—Deposit by insurance company—Priority of note-holders.*

The prerogatives of the Crown exist in British colonies to the same extent as in the United Kingdom. *The Queen v. The Bank of Nova Scotia* (11 Can. S.C.R. 1), followed.

The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government.

The Crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors is not interfered with by the provisions of the Bank Act (R. S. C. c. 120, s. 79) giving note-holders a first lien on such assets, the Crown not being named in such enactment. *Gwynne and Patterson, JJ., contra.*

Held, per Gwynne, J., that under legislation of the old Province of Canada, left unrepealed by the B. N. A. Act, no such prerogative could be claimed in the Provinces of Ontario and Quebec; the court would not, therefore, be justified in holding that such a right attached, under the B. N. A. Act, in one Province of Canada which does not exist in them all.

An insurance company, in order to deposit \$50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R. S. C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the Minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed the government claimed payment in full of this money as money deposited by the Crown.

Held, reversing the judgment of the court below, Strong, J., dissenting, that it was not the money of the Crown but held by the Finance Minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors.

Liquidators of the Maritime Bank v. The Queen.—xvii. 657.

22. Damages to property from works executed on government railway—Parol undertaking by officer of Crown to indemnify owners—Effect of.

See CONTRACT, 47.

Crown—Continued.

23. *Prerogative of—Dominion government—Mortgage—Beneficial interest in land—Exemption from taxation—R. S. O. (1887), c. 193, s. 7, ss. 1.*

Property of a bank became vested in the Dominion Government and a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale:

Held, affirming the judgment of the Court of Appeal, that the Crown having a beneficial interest in the land it was exempt from taxation as Crown lands. R. S. O. (1887), c. 193, s. 7, ss. 1.

Quirt v. The Queen.—xix. 510.

24. Crown lands, (P.Q.)—Location ticket—Transfer of purchaser's rights—Registration of—Waiver by Crown—License to cut timber—Cancellation of—23 V. c. 2, ss. 18 & 20 (Q.); 32 V. c. 11, s. 13 (Q.); 36 V. c. 8 (Q.).

See CROWN LANDS, 1.

25. Crown lands—License to cut timber—Free grants—Patent—Interference with rights of patentee. R. S. O. 1887, c. 25, s. 3.

See CROWN LANDS, 2.

26. Crown lands, taxation of—Sale—Delay in issuing patent.

See ASSESSMENT AND TAXES, 24.

27. *Liability of—Negligence of servant—Prescription—Arts. 2262, 2267, 2188, 2211, C. C.—44 V. c. 25—R. S. C. c. 38—50-51 V. c. 16, s. 18—Retroactive operation.*

Held, reversing the judgment of the Exchequer Court, that even assuming 50-51 V. c. 16, gives an action against the Crown for injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expresses no opinion), such Act is not retroactive in its effect and gives no right of action for injuries received prior to the passing of the Act.

Held, also, that even assuming that under the common law of the province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of in this case having been received more than a year before the filing of the petition the right of action was prescribed under Arts. 2262 & 2267 C. C.

Per Patterson, J.—The Crown is made liable for damages caused by the negligence of its servants operating government railways by 44 V. c. 25, R. S. C. c. 38, but as the petition of right in this case was filed after the

Crown—Continued.

passing of 50-51 V. c. 16, 1887, the claimant became subject to the laws relating to prescription in the province of Quebec, and his action was prescribed.

The Queen v. Martin.—xx. 240.

28. *Petition of right (P.Q.)—R. S. Q. Art. 5976.—Sale of timber limits—Licenses—Plan—Description—Damages—Art. 992 C. C.—Practice—Title of cause.*

Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before it issues, and after its issue works on lands and makes improvements on a branch of a river which he believed formed part of his limits, but was subsequently ascertained by survey to form part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale. Fournier, J., dissenting.

Per Patterson, J.—The licensee's remedy would be by action to cancel the license under Art. 992, C. C. with a claim for compensation for moneys expended.

In this case the action was instituted against the government of the province of Quebec, but when the case came up for hearing on the appeal to the Supreme Court, the court ordered that the name of Her Majesty the Queen be substituted for that of the government of the province of Quebec.

Grant v. The Queen.—xx. 297.

29. *Salaries of license inspectors—Approval by Governor-General in council—Liquor License Act, 1883, s. 6.*

On a claim brought by the board of license commissioners appointed under the Liquor License Act, 1883, for moneys paid out by them to license inspectors with the approval of the department of inland revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by order in council under section 6 of the said Liquor License Act, 1883:

Held, per Fournier, Taschereau and Patterson, JJ., affirming the judgment of the Exchequer Court, that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General in Council.

Per Ritchie, C.J., and Strong, J., that the Act under which appellant was appointed having been declared *ultra vires* the petition of right was not maintainable.

Burroughs v. The Queen.—xx. 420.

30. *Government railway—43 V. c. 8, construction of—Damage to farm from overflow of water—Negligence—Boundary ditches—Maintenance of.*

Held, affirming the judgment of the Exchequer Court, that under 43 V. c. 8, confirming the agreement of sale by the Grand Trunk Railway Company

Crown—Continued.

to the Crown of the purchase of the Rivière du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879 unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear, by the evidence relied on, to have been caused by the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed.

Morin v. The Queen.—xx. 515.

31. Contract—Carriage of mails—Authority of P. M. G. to bind the Crown—R. S. C. c. 35.

An action will not lie against the Crown for breach of a contract for carrying mails for nine months at the rate of \$10,000 a year, made by parol with the Postmaster-General and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than \$1,000 it could not be made without the authority of an order in council, and if temporary it was revocable at the will of the Postmaster-General.

Humphrey v. The Queen.—xx. 591.

32. Prerogative — Exercise of by local government — Provincial rights.

The government of each province of Canada represents The Queen in the exercise of her prerogative as to all matters affecting the rights of the province. *The Queen v. The Bank of Nova Scotia*, 11 Can. S. C. R. 1, followed. Gwynne, J., dissenting.

Under s. 79 of the Bank Act, R. S. C. c. 120, the note-holders have the first lien on the assets of an insolvent bank in priority to the Crown. *Strong and Taschereau, JJ.*, dissenting. (But see the present Bank Act, 53 V. c. 31, s. 53).

Liquidators of the Maritime Bank v. The Receiver-General of New Brunswick. xx. 695.

33. Grant of part of foreshore of harbour by local government—Conveyance by grantee—Claim of dower—Plea that grant void—Estoppel—Act of local legislature confirming title—Crown not expressly named.

See ESTOPPEL, 19.

Crown Case Reserved.

See CRIMINAL APPEALS.

Crown Lands.—*Crown lands, (P.Q.)—Location tickets—Transfer of purchaser's rights—Registration of—Waiver by Crown—Cancellation of license—23 V. c. 2, ss. 18 & 20—32 V. c. 11, s. 13 (Q.)—36 V. c. 8 (Q.).*

A location ticket of certain lots was granted to G. C. H. in 1863. In 1872 G. C. H. put on record with the Crown Lands Department that by arrangement with the Crown lands agent, he had performed settlement duties on another lot known as the homestead lot. In 1874, G. C. H. transferred his rights to appellant, paid all moneys due with interest on the lots, registered the transfer under 32 V. c. 11, s. 18, and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878 the commissioners cancelled the location ticket for default to perform settlement duties.

Held, reversing the judgment of the Court of Q. B. for L. C. (appeal side), that the registration by the commissioners in 1874, of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected. Taschereau, J., dissenting.

Holland v. Ross.—xix. 566.

2. Crown lands (Ont.)—License to cut timber—Free grants—Patent—Interference with rights of patentee.

By section 3 of R. S. O. (1887), c. 25, the Lieutenant-Governor in Council may appropriate any public lands . . . as free grants to actual settlers, etc., and by section 4 such grants or appropriations shall be confined to lands . . . within the tract or territory defined in that section. By section 10 pine trees on lands located or sold within the limits of the free grant territory after March 5th, 1880, shall be considered as reserved from the location, and shall be the property of Her Majesty, and section 11 enacts that patents of such lands located or sold shall contain a reservation of all pine trees on the land, and that any licensee to cut timber thereon may, during the continuance of his license, enter upon the uncleared portion and cut and remove trees, etc.

The L. Co. held a license, issued May 30th, 1888, to cut timber on land within the free grant territory, but which had not been appropriated under section 3 of the above Act. A license was first issued to the company in 1873 and had been renewed each year since that time. The license authorized the cutting of timber on lands unlocated and sold at its date; lands sold or located while it was in force; pine trees on lots sold under Orders in Council of May 27th, 1869, and pine trees, when reserved, on lots sold under Order in Council of April 3rd, 1880, upon the location described on back of license.

Regulations made by Order in Council of 27th May, 1869, provided that "all pine trees on any public land thereafter to be sold, which at the time of such sale or previously was included in any timber license, shall be considered as reserved from such sale and shall be subject to any timber license covering or including such land in force at the time of such sale, or granted within three years from the date of such sale, etc. All trees remaining on the land at the

Crown Lands—Continued.

time the patent issues shall pass to the patentee. A patent for a lot in the free grant territory was issued to S. on 18th March, 1884.

On the back of the license was a schedule of lots included in the location with the date of sale or location, and the sale or location of S.'s lot was mentioned. The company claimed the right to cut timber on said lot which had not been appropriated by the L. G. in C.

Held, affirming the judgment of the court of appeal for Ontario, that the provisions in sections 10 and 11 of R. S. O. (1887), c. 25, relating to the pine trees in the territory, only apply to such lots as have been specifically appropriated under section 3; that the license of the company, though renewed from year to year, was only an annual license; that the license issued in 1888 did not give the holders a right under the regulations of 27th May, 1869, to the timber on land patented in 1884, and that the company had notice, by their license of 1888, that the lot in question had been patented to S. more than three years previously.

Lakefield Lumber and Mfg. Co. v. Shalrp.—xix. 657.

3. Taxation of—Sale—Delay in issuing patent.

See ASSESSMENT AND TAXES, 24.

4. *Right of pre-emption—Lands reserved—Agricultural settlers*
—47 V. c. 14 (B.C.).

By 47 V. c. 14, s. 8. (f.), (B.C.) certain land conveyed to the E. & N. Ry. Co. was, for four years from the date of the Act, thrown open to the actual "settlers for agricultural purposes," coal and timber land excepted. H. and W. respectively claimed a right of pre-emption under this Act.

Held, affirming the decision of the Supreme Court of British Columbia, that the Act did not confer a right of pre-emption to lands not within the pre-emption laws of the province; that only "unreserved and unoccupied lands" came within those laws and the lands claimed had long before been reserved for a town site; and that the claimants were not upon the lands as "actual settlers for agricultural purposes," but had entered with express notice that the lands were not open for settlement.

Hoggan v. Esquimalt & Nanaimo Ry. Co., Waddington v. Esquimalt & Nanaimo Ry. Co. —xx. 235.

[In the case of *Hoggan v. Esquimalt & Nanaimo Railway Co.* an application made to the Judicial Committee of the Privy Council for leave to appeal has been granted, and the appeal stands for argument—May 15th, 1893.]

Curator—To substitution—Rights of action—Art. 154, C. C. P.

See SUBSTITUTION, 8.

2. To Substitution—Action to account—Indivisibility of—Purchase by curator—Art. 1484, C. C.

See ACCOUNT, 5.

WILL, 21.

Custom and Usage.

See PEWHOLDER, 1.

Custom of Paris—Arts. 279, 282 & 283.

See COMMUNITY.

**Customs Duties—Article imported in parts—Rate of duty—
Scrap brass—Good faith—46 V. c. 12, s. 153—Subsequent
legislation—Effect of—Statutory declaration.**

G., manufacturer of an "Automatic Sprinkler," a brass device composed of several parts, was desirous of importing the same into Canada, with the intention of putting the parts together there and putting the completed articles on the market. He interviewed the appraiser of hardware at Montreal, explained to him the device and its use, and was told that it should pay duty as a manufacture of brass. He imported a number of sprinklers and paid the duty on the several parts, and the Customs officials then caused the same to be seized, and an information to be laid against him for smuggling, evasion of payment of duties, under-valuation, and knowingly keeping and selling goods illegally imported, under ss. 153 & 155 of the Customs Act of 1883.

Held, reversing the judgment of the Exchequer Court, that there was no importation of sprinklers, as completed articles, by G., and the Act not imposing a duty on parts of an article, the information should be dismissed.

Held, also, that the subsequent passage of an Act, 48-49 V. c. 61, s. 12, re-enacted by 49 V. c. 32, s. 11, imposing a duty on such parts was a legislative declaration that it did not previously exist. [But see now 53 V. c. 7 (D.), An Act to amend The Interpretation Act.]

Grinnell v. The Queen.—xvi. 119.

**2. Teas in transit through United States to Canada—52 V. c. 14—
Tariff Act (1886), item 781.**

The plaintiffs made two shipments of tea from Japan to New York for transportation in bond to Canada. In one case the bills of lading were marked "in transit to Canada;" in the other the teas appeared upon the consular invoice made at the place of shipment to be consigned to the plaintiff's brokers in New York for transshipment to Canada. On the arrival of both lots at New York, and pending a sale thereof in Canada, they were allowed to be sent to a bonded warehouse as unclaimed goods for some five or six months and were finally entered at the New York Customs House for transportation to Canada, and forwarded to Montreal. There was nothing to show that the plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws or regulations of the United States or of Canada with respect to the transportation of goods in bond.

Held, affirming the judgment of the Exchequer Court (2 Ex. C. R. 126) Gwynne, J., dissenting, that as it clearly appeared that the tea was never entered for sale or consumption in the United States; that it was shipped

Customs Duties—Continued.

from there within the time limited by law for goods in transit to remain in a warehouse; and that no act had been done changing its character during transit, it was therefore "tea imported into Canada from a country other than the United States but passing in bond through the United States" and under s. 10 of the Act relating to duties on Customs (R. S. C. c. 88) not liable to duty as goods exported from the United States to Canada. [But see now 52 V. c. 14 (D).]

Present:—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Carter, Macy & Co. v. The Queen.—xviii. 706.

Cy Pres, Doctrine of—Reference to master to report scheme for administration of charitable fund.

See CHARITABLE TRUST.

D.

Dam—Demolition of—Arts 1918, 1920 C. C.—Report of expert—
Motion to hear further evidence—C. S. L. C. c. 51.

See TRANSACTION.

2. Damage to land by construction of dam—Prescription—Possession—Arts 503, 549, 2193 C. C.

See RIPARIAN PROPRIETORS, 4.

Damages—For disturbance in enjoyment of pew.

See PEWHOLDER, 1.

2. Action of trespass for assault, against Speaker of N. S. Legislature.

See LEGISLATURE, 9.

3. For trespass to wharf.

See NUISANCE.

4. For breach of contract for delivery of goods.

See CONTRACT, 1.

Damages—Continued.**5. For unlawful arrest.***See* CAPIAS.**6. Special and vindictive—Duty of appellate court.***See* JURISDICTION, 5.**7. Rent, loss of, as.***See* CONTRACT, 4.**8. Apportionment of in case of collision.***See* MARITIME COURT OF ONTARIO, 2.**9. Liquidated by provision in contract.***See* PETITION OF RIGHT, 1.**10. Resulting from breach of contract with government.***See* PETITION OF RIGHT, 8.**11. Excessive.***See* FISHERY OFFICER, 2.
LIBEL, 7.**12. Measure of—Breach of contract with captain of vessel.***See* CONTRACT, 6.**13. At sea.***See* SHIPS AND SHIPPING, 5.**14. To ship.***See* SHIPS AND SHIPPING, 4.**15. Special—Excessive.***See* LIBEL.**16. For breach of agreement; to be recovered by petition of right
—Judgment obtained against joint misfeasor—Effect of, in
reduction of damages.***See* PETITION OF RIGHT, 15.**17. Excessive—Application for new trial.***See* CORPORATIONS, 23; JURISDICTION, 22.

Damages—Continued.**18. Light and air, interfering with.**

See EASEMENT, 8.

19. Action on the case—Injunction, declaration alleging order for, obtained maliciously—Demurrer.

Action for maliciously obtaining an *ex parte* injunction order from a judge, whereby the plaintiff was restrained from disposing of certain lumber, in consequence of which he had sustained damage as was alleged.

The declaration set out that plaintiff was possessed as of his own property of certain lumber, the defendants wrongfully, improperly, maliciously and without any reasonable or probable cause, and without any notice to plaintiff made an *ex parte* application to a judge of the Supreme Court of New Brunswick for an injunction in a suit commenced by them in said Supreme Court on the equity side, in which suit defendants were plaintiffs and the now plaintiff with others were defendants, and procured from said judge an *ex parte* order of injunction whereby, etc., which order defendant caused to be served on plaintiff; that plaintiff afterwards appeared to the said suit and put in his answer, but defendants did not further prosecute their suit, which was dismissed with costs and the order of injunction became of no further effect; that by reason of obtaining and service on plaintiff of said order he was hindered and prevented from manufacturing, etc., said lumber for a long space of time whereby said lumber was greatly injured and part thereof lost and the plaintiff lost large gains, etc. To this declaration plaintiffs demurred.

The demurrer was sustained by the Supreme Court of New Brunswick. (See 2 Pugs. & Bur. 469.)

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that the declaration disclosed no cause of action.

By the statute of New Brunswick, 2 Revised Statutes, p. 77, such an order is granted on a sworn bill, or on the bill and an affidavit, and may be granted *ex parte*, subject to be dissolved on sufficient ground shown by affidavit on the part of the defendant. Here there was no allegation that the injunction was dissolved, or that any application was made for its dissolution, or that the order was obtained by any *suggestio falsi*, or *suppressio veri* on the part of the plaintiff, and for aught that appeared in the declaration, the judge exercised a sound discretion in granting the order.

Appeal dismissed with costs.

Collins v. Everitt.—12th December, 1879.

20. Adjoining land owners—Where defendant has allowed cellars to remain after building destroyed—Damage from water collecting in them and running against wall of house built by plaintiff—Whether defendant liable—Action on the case—Declaration—Non-suit.

The plaintiffs owned a building lot in the city of St. John on which they excavated a cellar and foundation, and built a large and valuable

Damages—Continued.

building. The soil of the bottom of the cellar and under the foundation was clay. The defendants owned the adjoining lot, on which, in 1848, (the time their ancestor, Stephenson, purchased it) there was a house. There was a cellar under the house adjoining the plaintiff's land. Stephenson, or his tenant dug another cellar joining the first one, and put up another house on the same lot. Those houses stood until 1871, when they were burned, leaving the cellars uncovered, thus making one large uncovered hole, bounded on the west by Charlotte Street, and on the north by the plaintiff's lot. These holes collected large quantities of water in them from the street and from the surface, and also by percolation from the land adjoining. When the plaintiff's house was built, the cellars being co-terminous with the foundation of the plaintiff's building, and the soil being clay, these holes retained the water until it gradually softened the clay under plaintiff's foundation wall, and also gradually destroyed the foundation of the wall itself, and escaped in that way into the plaintiff's cellar, and thereby caused the side of the plaintiff's building to settle, and the building itself to topple over and damaged it to a large extent.

The declaration contained two counts. The first count for wrongfully, carelessly, negligently and improperly removing the earth and soil of the defendant's lot, and negligently continuing it so removed so that there remained holes and excavations, which the defendants so negligently managed and left uncovered that large quantities of water collected and remained in the holes, which they permitted to flow and escape against, under and through the plaintiffs' foundation wall and thereby did damage.

Second count. The defendants improperly and negligently collected water, etc., and by their carelessness caused it to flow into the plaintiffs' premises and did damage.

The only plea was the general issue of not guilty.

A rule for a non-suit pursuant to leave reserved at the trial was made absolute by the Supreme Court of New Brunswick, on the ground that damage and injury must both concur to afford a party a right of action, and the evidence showed only an ordinary and legitimate use of the defendants' own land, which did not constitute an injury, and therefore they were not liable: *See 2 Pugs. & Bur. 523.*

On appeal to the Supreme Court of Canada, **Held**, that the declaration did not cover the appellant's case, and therefore the non-suit was correct.

Appeal dismissed with costs..

The Trustees of the St. John Young Men's Christian Association v. Hutchinson, et. al.
—23rd February, 1880.

21. For breach of contract to sell on commission.

See CONTRACT, 10.

22. For breach of contract for sale of goods.

See SALE OF GOODS, 10.

Damages—Continued.**23. Damages, action for—Rule for estimating—Finding of judge of first instance not considered excessive—Defendant's abuse of authority as Justice of the Peace.**

The plaintiff by his declaration alleged: That, in the city of Three Rivers, on or about the fifteenth day of the month of June, 1878, the plaintiff sold to defendant a cart-load of wood, for the price of forty cents, which the defendant agreed to pay plaintiff in cash: That the plaintiff went immediately and laid the said wood in the yard of the residence of defendant: That when plaintiff asked defendant for payment the defendant refused and told plaintiff to go and immediately take his wood away if he would not wait for his payment: That then plaintiff returned peaceably to the yard of defendant and began to replace the said wood in his cart to take it away, and that when he was about to finish reloading his cart defendant entered the yard and abused plaintiff, calling him a thief, and threatening to have him arrested and imprisoned for theft if he did not leave the wood in the yard: That the defendant, abusing his capacity of magistrate, or justice of the peace, sent for some policemen or constables to have plaintiff imprisoned for theft: That in fact, two policemen or constables arrived immediately on the spot, and conformably to the order and command of the said justice of the peace, the defendant, summoned the plaintiff to unload his cart and leave the wood in the yard, and if not, they would arrest and take him a prisoner for theft: That the plaintiff at that order answered he was ready to leave and deliver the said wood to defendant, on condition that the latter would consent to give him the price of it; but as defendant was not willing to pay him immediately, he (the plaintiff) was not obliged and was not willing to leave with him the said wood, that he could not do so, because he wanted some money to provide for his own wants and those of his family: That in obedience to the orders of defendant, the said policemen arrested plaintiff and took measures to hold his person and treat him like any other prisoner, but consented that plaintiff, before being taken to jail or to a magistrate, should take care of his horse and cart and put them out of the yard of the defendant: That for the purpose of taking his cart out of the yard, plaintiff took in his right hand the reins and put his left hand on the forepart of the said cart to be nearer the said cart and not be hurt by the posts of the gate of the yard, and afterwards made his horse slowly advance towards the gate of said yard: That plaintiff was then on the left side of the said cart and his left hand was lying on the end of the frame of the said cart, lying on the back of the shaft of the said cart, on the left side: That the said cart being an upsetting one and then heavily loaded, was kept from upsetting by a stick or piece of wood passed through an iron cramp fixed to the right shaft and rising over the frame (right side) of the said cart through a mortise in the said frame: That while plaintiff was advancing his cart out of the yard, defendant went to the right side of the cart and maliciously, and knowing that his action would cause to plaintiff grievous bodily harm, violently pulled out the stick or piece of wood passed in the said cramp and by so doing upset the said cart and caused the middle finger of plaintiff's left hand to be bruised, torn and pulled out in the middle of the third phalanx, the bone being fractured at the root of the nail and all the

Damages—Continued.

part of the said finger, from there to the end of the said finger, being completely separated from the rest of the said finger, and caused all the other fingers and said plaintiff's left hand to be horribly bruised, broken and fractured: That in consequence thereof the amputation of the said middle finger of the plaintiff's left hand became necessary, and a short time after said amputation lockjaw set in, and he for a long time suffered all the convulsions and horrible pains of said disease, and was confined to bed for nearly a month, his life being despaired of, and he was rendered incapable of earning bread for his family, and was permanently disabled from using his left hand.

For these various injuries to his feelings, reputation and health he claimed as damages \$4,000.

The Superior Court at Three Rivers (Polette, J.) was of opinion the plaintiff had proved these allegations, and assessed his damages at \$3,000.

On appeal to the Court of Queen's Bench, that court reduced to \$600 the amount of damages allowed to plaintiff and condemned him to pay all the costs of appeal.

On appeal to the Supreme Court of Canada, **Held**, Taschereau, J., dissenting, that in view of the very serious injuries sustained by the plaintiff and of the misconduct of the defendant, who appears to have abused his position of a Justice of the Peace, the amount awarded by the judge of first instance was not so clearly excessive as to justify the pronouncing his judgment erroneous.

Per Taschereau, J.—Though the amount awarded by the Court of Queen's Bench was not sufficiently large, yet taking into consideration the position of the plaintiff and the nature of the injuries \$3,000 was excessive.

Per Fournier, J.—The abuse by the plaintiff of his position of Justice of the Peace was an important element to be taken into consideration in fixing the amount of damages.

Per Gwynne, J.—The sound rule to adopt is that in mere matters of fact, or in the estimation of damages not capable of precise calculation, or not ascertainable by the application of any rule prescribing a measure of damage, this court should sustain the judgment of the judge of first instance, unless satisfied that his conclusions are clearly erroneous.

Levi v. Reed 6 Can. S. C. R. 482 (*See Jurisdiction*, 5) approved.

Appeal allowed with costs in Court of Queen's Bench and Supreme Court.

Gingras v. Desilets.—11th February, 1881.

24. Action of, against Telegraph Co. for cutting trees.

See TRESPASS, 7.

Damages—Continued.

25. *Action of damages for malicious proceedings in insolvency—Demurrers, judgment on when not final not appealable—Pleading—Trespass—Order by judge of court below directing payment of part of verdict as condition of stay of execution illegal—Leave granted to appeal on whole case—Security allowed.*

An action for malicious proceedings in insolvency.

The declaration contained eight counts.

"1. For that the defendants falsely and maliciously, and without reasonable or probable cause, on the 18th day of April, 1879, caused and procured a writ of attachment under the Insolvent Act of 1875 and amending Acts, to be issued against the estate and effects of the plaintiff, who was then a trader, saloon-keeper and miner, residing and carrying on business in Cariboo, and in manner aforesaid caused and procured the said writ to be served upon the plaintiff, to be published, and the plaintiff's real and personal property, goods and effects, to be taken from him; and after the issue of the said writ, and within five days from the service thereof, the plaintiff duly presented a petition to the judge authorized to act in the premises, hereinafter called the County Court Judge, praying that the said writ and the attachment made thereunder might be set aside; and such proceedings were thereupon had, that afterwards the said County Court Judge dismissed the said petition with costs, and directed the proceedings in insolvency to go on; that thereupon the plaintiff duly appealed from such decision to the Supreme Court, and such proceedings were thereupon had, that afterwards, on the 27th day of February, A.D., 1880, the said Supreme Court ordered that the said decision be set aside and condemned the defendants in the costs of appeal* and the proceedings on the said writ were thereupon then ended and determined, and by reason of the premises, the plaintiff was put to inconvenience and anxiety, and incurred great pain and distress of body and mind, and was prevented from transacting his business, collecting his debts, and lost many of his debts by reason of being so deprived, as aforesaid, for a long time, of the opportunity of collecting the same, and was injured in his credit, and his business became and was destroyed, and he incurred great expense in taking and defending the several legal proceedings hereinbefore mentioned, and in re-possessioning himself of his estate, and in journeying from Cariboo to Victoria and back for the furtherance of his interests in the premises, and in attending to the said legal proceedings; and his property, while out of the plaintiff's possession, became damaged and deteriorated in value, and the plaintiff has been otherwise greatly injured."

2. The same as the first count as far as the asterisk; it then proceeds as follows: "And afterwards the said County Court Judge, on the 8th day of May, A.D. 1880, having complete jurisdiction in that behalf, ordered that the said writ of attachment be set aside and annulled; that thereupon the defendants appealed from the said order, and on the 26th day of May, 1883, caused the appeal to be set down for hearing on the 14th day of June, A.D.

Damages—Continued.

1880, before the Supreme Court. That on the 14th day of June, 1880, it was considered by the said Supreme Court that the defendants had not proceeded with their appeal according to the law or the rules of practice, and, on the application of the plaintiff, the said Supreme Court ordered that the record (if any) be returned to the officer entitled to the custody thereof, and condemned the defendants to pay the plaintiff the costs by him incurred in the matter of the said appeal."

Conclusion, as in the first count, from asterisk.

"3. And the plaintiff also sues the defendants for that a writ of attachment on the 18th day of April, 1879, having been sued out under the Insolvent Act of 1875 and amending Acts by the defendants against the estate and effects of the plaintiff, who was then a trader, saloon-keeper and miner, residing and carrying on business in Cariboo, which writ was duly served upon the plaintiff, and whereby the plaintiff's real and personal property, goods and effects were seized and taken from him, the plaintiff after the issue of the said writ and within five days from the service thereof duly presented a petition to the judge duly authorized in that behalf hereinafter called the County Court Judge, praying that the said writ and the attachment made thereunder might be set aside, and the said petition came on for hearing before the said County Court Judge on the 15th day of May, 1879; and the defendants maliciously and without reasonable or probable cause appeared before the said County Court Judge, and opposed the said petition and caused and procured the said County Court Judge to decline to hear or adjudicate upon the said petition. That afterwards the plaintiff obtained a summons from one of the judges of the Supreme Court, calling upon the said County Court Judge and upon the defendants to show cause why the said County Court Judge should not proceed to hear and adjudicate upon the said petition, and on return of the said summons, to wit, on the 8th day of September, A.D. 1879, the defendants maliciously and without any reasonable or probable cause opposed the application, and thereupon the said Supreme Court Judge on the said 8th day of September, 1879, ordered the said County Court Judge to proceed to hear and adjudicate upon the said petition. And thereupon the defendants maliciously and without reasonable or probable cause appealed from such last mentioned order to the Supreme Court, but the said Court on the 25th day of September, 1879, confirmed the said last mentioned order and dismissed the said appeal. That afterwards in pursuance of the said last mentioned order the said petition came before the said County Court Judge for hearing, and the defendants again maliciously and without reasonable or probable cause appeared upon the hearing of and opposed the said petition, and caused and procured the said County Court Judge on the 31st day of October, 1879, to dismiss the said petition with costs and to direct the proceedings in insolvency to go on. That thereupon the plaintiff duly appealed from the said last mentioned decision to the Supreme Court, and upon the hearing of the said appeal the defendants again maliciously and without reasonable or probable cause appeared and opposed the said appeal, but the

Damages—Continued.

said Supreme Court on the 27th day of February, A.D. 1880, set aside the decision of the said County Court Judge of the 31st day of October, 1879." *

Conclusion as in first count from asterisk.

4. The same as third count down to asterisk, it then continued as follows:—

"And thereupon the plaintiff applied to the said County Court Judge in pursuance of the said petition to set aside and annul the said writ, and the attachment made thereunder, and the defendants again maliciously and without any reasonable or probable cause, appeared before the said County Court Judge and opposed such application, but the said County Court Judge, after hearing the said application, made an order setting aside and annulling the said writ and attachment, and thereupon, the defendants maliciously and without reasonable or probable cause, appealed from the said last mentioned order of the 8th day of May, 1880, to the Supreme court, and on the 26th day of May, 1880, caused the appeal to be set down for hearing on the 14th day of June, 1880. That on the said 14th day of June, 1880, it was considered by the Supreme Court, that the defendants had not proceeded with their said appeal according to law or the rules of practice, and on the application of the plaintiff, the said Supreme Court ordered that the record (if any) be returned to the officer entitled to the custody thereof, and condemned the defendants to pay the plaintiff the costs by him incurred in the matter of the said appeal."

Conclusion is in the other counts.

5. "And the plaintiff also sues the defendants for that, after the issuing of the writ of attachment as in the third count mentioned, the defendants maliciously and without any reasonable or probable cause, caused, advised and procured divers alleged creditors of the plaintiff to prove their alleged claims against the plaintiff, and caused, advised and procured such creditors to support the writ of attachment, and the said writ was determined as in the third count mentioned, and by reason of the premises the said writ of attachment remained in force for a longer time than otherwise it would, and the plaintiff was put to inconvenience and anxiety, etc.

Conclusion as in other counts.

6. The same as the fifth count, except that it refers to the issuing and determination of the writ "as in the fourth count mentioned."

7. "And the plaintiff also sues the defendants for that at the time of the grievance hereinafter mentioned the plaintiff was a trader, saloon keeper and miner, residing and carrying on business in Cariboo, and the defendants maliciously, and without any reasonable or probable cause, caused and procured the plaintiff's houses, situate at Cariboo, to be entered and the plaintiff to be dispossessed thereof for a long time, and his goods and chattels, mines and books of account to be seized and taken from him, and the plaintiff to be deprived of the use and enjoyment of the same respectively for a long time, and by reason of the premises the plaintiff was put to inconvenience and anxiety, incurred great pain and distress of body and mind, was prevented from transacting his business, collecting his debts, and lost many of his debts

Damages—Continued.

by reason of being so deprived as aforesaid for a long time of the opportunity of collecting the same, and was injured in his credit, and his business became and was destroyed during the time the plaintiff was so dispossessed and deprived of the said houses, mines, goods and chattels, and the same became greatly deteriorated in value, and the plaintiff incurred great expense in re-possessing himself of the said houses, mines, and books of account, goods and chattels, and was otherwise greatly injured."

"8. And the plaintiff also sues the defendants for that the defendants with force and arms broke and entered the plaintiff's houses and mines at Cariboo, dispossessed the plaintiff thereof respectively, and remained therein and in possession thereof respectively for a long time, to wit: eighteen calendar months, and also seized and took and for the time aforesaid detained and dispossessed the plaintiff of all his books of accounts, goods, chattels and effects, consisting principally of merchandise and furniture, whereby the plaintiff for and during all that time lost and was deprived of the use of the said houses, mines, goods, chattels and effects, and thereby the same became and were greatly damaged, lessened in value and spoiled, and divers of the plaintiff's book debts were lost."

"And the plaintiff claims thirty thousand dollars."

The defendants pleaded not guilty, and pleas traversing the allegations in the several counts, and, as to the seventh and eighth counts, justifying under the writ of attachment.

They also demurred to all the counts, except the seventh and eighth.

The issues of fact were tried before the Chief Justice, Sir M. B. Begbie, and a special jury on the 2nd and 3rd of June, 1881, when the jury returned a verdict as follows: "we find a verdict for the plaintiff and award him no damages before the 16th of May, 1879. Subsequent to that date we award him \$5,000."

The demurrers were argued before Sir M. B. Begbie and Mr. Justice Crease on the 27th day of June, 1881, and were over-ruled.

Upon the same day (the 27th June) the plaintiff moved for judgment in conformity with the verdict of the jury, which the Chief Justice pronounced ordering the plaintiff to take judgment for \$5,000 with costs.

On the 11th of July, 1881, the Chief Justice granted the defendants a stay of execution until the cause could be re-heard before the full court of British Columbia, on condition of the payment of \$1,000 and taxed costs to the plaintiff.

On application to one of the judges of the Supreme Court of Canada, the defendants were permitted to deposit \$500 in that court as security for the costs of appeal.

The defendants thereupon brought their appeal to the Supreme Court of Canada, but confined it to the judgment on the demurrers, and did not appeal from the judgment of the Chief Justice ordering judgment to be entered on the verdict, being probably under the impression that that judgment should

Damages—Continued.

be heard before the full court of British Columbia before an appeal would lie therefrom to the Supreme Court of Canada.

The "case" contained the proceedings on the demurrers, and the formal order over-ruling them. This formal order was added to the "case" after its transmission, by special order.

On the 1st of March, 1882, a motion was made on behalf of the plaintiff to quash the appeal for want of jurisdiction. 1. Because the appeal was not from the final judgment of the highest court of last resort in the province of British Columbia. 2. Because the judgment over-ruling the demurrers to only six counts of the declaration was not a final judgment from which an appeal would lie.

At the same time a motion was made on behalf of the defendants that, in the event of the court being of opinion the appeal was not regular, leave be given to appeal from the judgment on the whole case as well as on the demurrers, without any appeal being had to any intermediate court of appeal in the province, and that the "case" might be amended to include the judgment on the whole case, and the pleadings, proceedings and evidence necessary to raise the question for the decision of the court.

On the 22nd June, 1882, the Supreme Court of Canada, **Held**, that the judgment was not one from which an appeal would lie, and it ordered the appeal to be quashed. The court further ordered that the defendants might appeal from the judgment on the whole case as well as on the demurrers, provided the "case" and factums of defendant should be filed before the 15th day of September then next, and the appeal brought on for hearing at the then next session of the court; in default the appeal to stand dismissed with costs without further order. The court further ordered that the \$500 paid into court on the 18th September, 1881, should remain in court as security for the costs of the appeal then allowed.

On application the time was further extended for filing the "case" and factums.

After hearing the argument of the appeal, the Supreme Court of Canada **Held**, that the defendants were entitled to judgment both on the demurrers and on the facts. That the 3rd, 4th, 5th and 6th counts of the declaration were admittedly bad, and the 1st and 2nd counts were also bad. It was not alleged that the defendants procured the writ of attachment to issue by any false statement, there was no allegation that the defendants were not creditors of the plaintiff, or that he had not failed to meet his engagements as they became due, or that he was not liable to be put into insolvency. That as to the 7th and 8th counts, the jury having confined the damages to acts done subsequently to the 16th May, 1879, and the defendants by their plea to these counts justifying under the writ of attachment, and the acts complained of having been committed on the 3rd May, 1879, under the writ while in force, the finding, which was a general one, was in effect a finding in favour of the defendants upon the issue joined on the plea to the said counts. That the plaintiff should be ordered to repay to the defendants the \$1,000 paid by them under the order of the Chief Justice of the 11th July, 1881, there being nothing in the law to justify the court below in ordering such a payment.

Damages—Continued.

Appeal allowed with costs in both courts; judgment on the demurrers over-ruled and demurrers allowed; judgment ordered to be entered for the defendants upon the demurrers and upon the 7th and 8th counts; the order of the 11th July, 1881, set aside; and plaintiff ordered to repay the \$1,000 with interest at 6 per cent. from that day, together with the sum paid for costs of suit under that order.

Bank of B. N. A. v. Walker.—19th March, 1883.

26. Caused by tug towing raft—Liability for.

See MARITIME COURT OF ONTARIO, 4.

27. Caused by fire communicated from premises of Railway Company.

See RAILWAYS AND RAILWAY COMPANIES, 16.

28. For breach of contract to supply meat.

See CONTRACT, 21.

29. Caused by neglected condition of streets—Liability of City of Halifax.

See CORPORATIONS, 18.

30. *Action for cost of repairs to printing press and freight charges—Lease with privilege of purchasing—Saisie re-vendication—Dilatory exceptions—Art. 120, C. C. P. s-s. 7.*

About the 22nd of June, 1878, plaintiffs (printing press manufacturers of New York), made an agreement with the defendant, (the proprietors of the Post newspaper), in the form of a lease of a printing press with its appurtenances for six months, at a rental of \$1,000 payable in advance, plaintiffs obliging themselves to erect the press on the premises of the defendants. The lease contained a stipulation, that the said lessees should have the privilege of purchasing the press, at the expiration of the lease, for \$4,500.

It was also agreed in said lease, that failing purchase, defendants would deliver the said press and appurtenances at the expiration of the lease in as good order and condition as the same were at the commencement of the said lease, reasonable wear and tear and accident by fire excepted, free of all charges and unbroken, free on board in Montreal, with freight paid to New York.

Plaintiffs erected a press; defendants paid the \$1,000, and held the press under said lease until the expiration thereof; and then instead of returning it as stipulated in the clause of said lease lastly recited, continued to use it; and some time after the lease had terminated, plaintiffs, considering that defendants had exercised their option to purchase the press, instituted an

Damages—Continued.

action against the defendants, accompanied by an attachment *saisie conservatoire* for the recovery of the purchase price, \$4,500.

To that action defendants pleaded in effect, that they had never exercised their option to purchase, and had never become purchasers of the press; and that whatever remedy plaintiffs had, they had no right to a suit for the price of the press, as for goods bought and sold; and the result was that the plaintiffs' action was dismissed, and the judgment dismissing it was confirmed in the Court of Review.

During the time the above-mentioned suit was pending, defendants (who had given a friend as guardian of the press seized under *saisie conservatoire*) continued to use and employ the press for a period of sixteen months and twenty-six days, at the expiration of which period plaintiffs obtained possession of the press under a *saisie revendication*, removed it by their own men, and placed it on board of the cars addressed to them at New York, where it ultimately arrived. On arrival there it was found to be in such a state of disrepair that large expenditure was necessary in order to fit it for use and to put it in the condition in which it was at the time that it had been leased to the defendants, reasonable wear and tear excepted.

Plaintiffs then instituted the present suit against the defendants, claiming by one count of their declaration the sum of \$2,809.13, as the value of the use and occupation of the press and its appurtenances during the said term of sixteen months and twenty-six days, at the rate established in the lease itself, viz.: \$1,000 for six months.

By a second count plaintiffs claimed payment of the like sum of \$2,809.13, as damages suffered and sustained by them through the use and employment and retention by the defendants of the said press and its appurtenances, after the expiration of the said lease.

By a third count plaintiffs claimed a further sum of \$299.35 as the costs and expenses of taking down, packing, loading and removing said press and appurtenances to New York, including the freight and other necessary charges thereon, defendants having agreed to deliver the said press free on board, freight paid to New York.

Defendants filed severally dilatory exceptions under Article 120 of the Code of Civil Procedure, sub-section 7, setting up that plaintiffs were not resident in the province and that no power of attorney from them had been produced. These exceptions were dismissed by the Superior Court of Lower Canada. (Rainville, J.)

The defendant's pleas to the merits raised only issues of fact.

The Superior Court (Jetté, J.) gave plaintiffs \$2,000, in consequence of the deterioration and damages caused to the press, and a further sum of \$160.50 for cost of transport.

This judgment was confirmed by the Court of Queen's Bench for Lower Canada (appeal side).

On appeal to the Supreme Court of Canada, Held, that the judgments of the courts below should be affirmed (Henry, J., dissenting).

Appeal dismissed with costs.

Mullin v. Hoe.—17th February, 1885.

Damages—Continued.

31. Action against municipal corporation for defective bridge.

See CORPORATIONS, 19.

32. Action of, for use and occupation of land—Prescription.

See LAND, 3.

33. Action against railway company — Negligence — “*Res ipsa loquitur*.”

See RAILWAYS AND RAILWAY COMPANIES, 21.

34. To raft by bridge—Powers of Bridge Company—43 V. c. 61 (D.), & 44 V. c. 51 (D.).

See NAVIGATION, 3.

35. Action for—Illegal arrest—Transient trader—By-law of city of Quebec—License.

See LICENSE, 6.

36. Action by land owner in city of Quebec against corporation for authorising use of streets by North Shore Railway Co.

See CORPORATIONS, 21.

37. Street railway—Defective track—Accident.

See RAILWAYS AND RAILWAY COMPANIES, 23.

38. Railway Company—To husband by loss of wife—To children by loss of mother.

See RAILWAYS AND RAILWAY COMPANIES, 24.

39. Corporation—Liability for damages caused by defective sidewalk.

See CORPORATIONS, 23.

40. *Railway—Agreement by municipal corporation to take stock and to pay for in debentures—Breach of Agreement—Right to sue for special damages—Arts. 1065, 1070, 1073, 1077, 1840 & 1841, C. C. (P.Q.)*

The Corporation of the County of Ottawa under the authority of a by-law undertook to deliver to the Montreal, Ottawa and Western Railway Company for stock subscribed by them 2,000 debentures of the corporation of \$100 each,

Damages—Continued.

payable twenty-five years from date and bearing six per cent. interest, and subsequently, without any valid cause or reason, refused and neglected to issue said debentures. In an action brought by the company against the corporation solely for damages for their neglect and refusal to issue said debentures,

Held, affirming the judgment of the court below, that the corporation, apart from its liability for the amount of the debentures and interest thereon, was liable under Arts. 1065, 1073, 1840 and 1841, C. C., for damages for breach of the covenant. Ritchie, C.J., and Gwynne, J., dissenting.

Corporation of County of Ottawa v. Montreal, Ottawa & Western Ry. Co. —xiv. 193.

41. Railway company—Accident—Negligence—Wharf—Ferry—
Damages increased by adding interest from date of demand.

See RAILWAYS AND RAILWAY COMPANIES, 26.

42. Dead freight—Amount of agreed freight which would have been earned on deficient cargo.

See SHIPS AND SHIPPING, 8.

43. Nominal damages—Court will not grant new trial when defendant entitled to, for technical breach of contract.

See NEW TRIAL, 15.

44. Negligence in management of ferry under control of corporation.

See MUNICIPAL CORPORATION, 7.

45. *Misdirection as to solatium—New Trial—Art. 1056, C. C.*

In an action of damages brought for the death of a person by the consort and relations under Art. 1056, C. C. which is a re-enactment and reproduction of the Con. Stat. L. C. c. 78, damages by way of *solatium* for the bereavement suffered cannot be recovered. Judgment of the court below reversed and new trial ordered.

Canadian Pacific Ry. Co. v. Robinson.—xiv. 105.

46. For interference with servitude—Art. 557, C. C.

See SERVITUDE.

47. *Art. 1056, C. C.—Solatium—Cross-appeal—Notice.*

In an action for damages, brought against the corporation of the city of Montreal by Z. L., *et al.*, the descendant relations of L., who was killed driving down St. Sulpice street, alleged to have been at the time of the accident in a bad state of repairs, by being thrown from the sleigh, on which he was seated, against the wall of a building, the learned judge, before whom the case was

Damages—Continued.

tried without a jury, granted *Z. L. et al.* \$1,000 damages on the ground that they were entitled to the said sum by way of *solatium* for the bereavement suffered on account of the premature death of their father.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, appeal side, that the judgment could not be affirmed on the ground of *solatium*, and as the respondents had not filed a cross-appeal to sustain the verdict on the ground that there was sufficient evidence of a pecuniary loss for which compensation could be claimed, *Z. L. et al.*'s action must be dismissed with costs.

City of Montreal v. Labelle.—March 2nd, 1888—xiv. 741.

See DAMAGES, 45.

48. Railway company—Sparks from engine—Defective engine—Negligence.

See RAILWAYS AND RAILWAY COMPANIES, 40.

49. Elevator—Negligence of employees—Liability of landlord—Damages—Art. 1054, C. C.—Vindictive damages—Cross-appeal.

On the 13th April, 1883, C., an architect who had his office on the third flat of a building in the city of Montreal, in which the landlord had placed an elevator for the use of the tenants, desiring to go to his office, went towards the door admitting to the elevator, and seeing it open entered, but the elevator not being there he fell into the cellar and was seriously injured. In an action brought by C. against R., the landlord, claiming damages for the injury suffered, it was proved at the trial that the boy, an employee of R. in charge of the elevator at the time of the accident, had left the elevator with the door open to go to his lunch leaving no substitute in charge. It was shown also that C. had suffered seriously from a fracture to the skull, had been obliged to follow for many months an expensive medical treatment and had become almost incapacitated for the exercise of his profession. C. had been in the habit of using the elevator during the absence of the boy. The trial judge awarded C. \$5,000 damages, and on appeal to the Court of Queen's Bench (appeal side), P.Q., that amount was reduced to \$3,000 on the ground that C. was not entitled to vindictive damages. On appeal to the Supreme Court of Canada:—

Held, affirming the judgment of the court below, that R. was liable for the fault, negligence and carelessness of his employee, and that the amount awarded was not unreasonable.

Held, also that the sum of \$5,000 awarded by the Superior Court was not an unreasonable amount and could not be said to include vindictive damages, but as no cross-appeal had been taken the judgment of the Superior Court could not be restored.

Stephens v. Chausse.—xv. 379.

Damages—Continued.

50. Municipal corporation—Construction of crossing—Elevation above level of street—Negligence.

See MUNICIPAL CORPORATION, 10.

51. Railway accident, action of damages for—Death of plaintiff — Abatement of action — *Actio personalis moritur cum persona*—Lord Campbell's Act—C. S. N. B. c. 86—No cause before the court and appeal quashed.

See ACTION, 5.

52. Railway company, death caused by negligence of, running through town—Contributory negligence—Insurance on life of deceased—No reduction of damages for.

See RAILWAYS AND RAILWAY COMPANIES, 46.

53. Expropriation of land for railway purposes—Estimation of damages—R. S. C. c. 39, s. 3, s-s. (e)—Farm crossings—R. S. C. c. 38, s. 16—52 V. c. 38, s. 3.

See EXPROPRIATION, 8.

54. Action for libel—Misdirection of jury—Excessive damages—Consent to reduction.

See LIBEL, 4.

PRACTICE, 11.

55. Caused by sparks from locomotive—Responsibility of company — R. S. C. c. 109; s. 27 — 51 V. c. 29, s. 287—Limitation of actions for damages.

See RAILWAYS AND RAILWAY COMPANIES, 53.

56. Marine insurance—Action for total loss—Right to recover for partial loss—New trial to ascertain damages unless reference agreed upon by parties.

See INSURANCE, MARINE, 30.

Damages—Continued.

57. *Action for libel—Damages in discretion of court of first instance—Rule as to interference by Court of Appeal—Mercantile agency—False information—Negligence—Arts. 1053, 1054 and 1727, C. C.*

In an action for libel the judge who tried the case in the first instance awarded the plaintiff \$2,000. The Court of Queen's Bench for Lower Canada (appeal side) reduced the damages to \$500.

Held, that the amount of damages awarded by the judge in the Court of first instance in his discretion, should not be interfered with by a Court of Appeal unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the judge: *Levi v. Reed*, 6 Can. S. C. R. 482 (see *Jurisdiction* 5), and *Gingras v. Desilets* (see *Damages* 23), followed.

Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor.

Cossette v. Dun.—xviii. 222.

58. *Solicitor and client—Negligence of solicitor in not registering judgment.*

See *SOLICITOR AND CLIENT*, 5.

59. *Dog—Injury committed by—Ownership—Scienter—Evidence for jury.*

W. brought an action for injuries to her daughter committed by a dog owned or harboured by the defendant V. The defence was that V. did not own the dog, and had no knowledge that he was vicious. On the trial it was shown that the dog was formerly owned by a man in V.'s employ who lived and kept the dog at V.'s house. When this man went away from the place he left the dog behind with V.'s son, to be kept until sent for, and afterwards the dog lived at the house going every day to V.'s place of business with him, or his son who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial judge ordered a non-suit, which was set aside by the full court and a new trial ordered.

Held, affirming the judgment of the court below, that there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities and the non-suit was rightly set aside.

Present.—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Vaughan v. Wood.—March 10th, 1890—xviii. 708.

Damages—Continued.

60. Common carrier—Special contract with—Baggage “at owner’s risk against all casualties”—Exemption from liability.

See CARRIERS, 5.

61. Damages to property from works executed on government railway—Parol undertaking to indemnify owners by officer of the Crown—Effect of.

See CONTRACT, 47.

62. Fall of wall after fire—Negligence—*Vis major*—Art. 17, s-s. 24, 1053, 1055, 1071, C. C.

See EVIDENCE, 31.

63. Libel—Special damage—Loss of custom—Pleading.

See LIBEL, 6.

PLEADING, 20.

64. 43 V. c. 8—Government railways—Injury by overflow of water.

See CROWN, 30.

65. Road company—Collector of tolls—Negligence—Liability of company.

See NEGLIGENCE, 37.

66. To passenger by breaking of rail—Liability of railway company for latent defects—Arts. 1053, 1675, C. C.

See RAILWAYS AND RAILWAY COMPANIES, 69.

67. Libel in newspaper—Action for—Additional libel in plea—Excessive damages—Alternative of reduction of, or new trial.

See LIBEL, 7.

68. Expropriation of land for railway purposes—Value of land for building purposes—Damages resulting from want of crossing.

See EXPROPRIATION, 17.

69. Discharge of steam from engine—Nuisance—“*Sic utere tuo ut alienum non lædas.*”

See NEGLIGENCE, 39.

Dead Freight.

See SHIPS AND SHIPPING, 8.

Debats de Comptes.

See EXECUTORS, 1.

EVIDENCE, 8.

Debentures—Issued by trustees under statutory authority.

See PETITION OF RIGHT, 6.

2. Joint purchase of.

See PARTNERSHIP, 2.

3. Agreement by municipal corporation to pay for stock in railway company—Breach—Special damages.

See DAMAGES, 40.

4. Issued by municipality after compliance with conditions precedent to by-law—Railway company entitled to, free from future conditions on their face—Municipal Code, (P.Q.), Art. 982.

See CORPORATIONS, 33.

5. Municipal aid to railway company—Debentures signed by warden *de facto*—44 & 45 V. c. 2, s. 19 (Q.)—Completion of railway line—Evidence of.

See RAILWAYS AND RAILWAY COMPANIES, 52.

Debtor—Appropriation by.

See PAYMENT, 5.

2. Assignment in trust for creditors—Release by—Insufficient authority to sign for creditor—No subsequent assent or ratification by creditor—No estoppel.

See ASSIGNMENT, 14.

Deceit—Action of against company and promoters—Misrepresentation—Concealment—False statements in prospectus.

See CORPORATIONS, 24.

2. Conveyance of land—Setting aside for fraud and misrepresentation as to matter of title—Fraud to be established to same extent and degree as in action for deceit.

See SALE OF LANDS, 27.

Deed—Escrow—Estoppel.

To a declaration for quiet enjoyment in a mortgage to the plaintiffs, executed by T., the defendants' grantee, R., one of the defendants, pleaded that T. did not, after the making of that deed, convey to the plaintiffs. The deed from defendants to T. was dated 22nd June, 1855, and the mortgage from T. to the plaintiff was dated 10th April, 1855. Both were registered on the 28th July, 1855—the deed first. It appeared that there were two mortgages from T. to the plaintiffs on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendants to him was necessary to give the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August, 1855.

Held, on appeal, affirming the judgment of the Court of Queen's Bench, Ontario, that the whole transactions shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiff, therefore, could recover. Also, that assuming the deed of the 10th of April to have been a completed instrument from its date, the usual covenant contained in it that the grantor was seized in fee at the date of the deed created an estoppel, and that the estoppel was fed by the estate T. acquired by deed of 22nd June, 1855. (Henry, J., dissenting.)

The Trust and Loan Co. v. Ruttan.—i. 564.

2. Erroneous statement in—Evidence as to.

See JUDICIAL AVOWAL.

3. *Prohibition to alienate in a purely onerous title void*—Art. 970, C. C. L. C.—18 V. c. 250.

By 18 V. c. 250, W. F. and his brother were authorized to sell certain entailed property in consideration of a non-redeemable rent representing the value of the property. On the 7th September, 1860, the appellant and E. F. assigned to their brother, A. F., a piece of land forming part of the above entailed property, in consideration of a *rente foncière* of six pounds, payable the 1st day of October of each year. The deed was registered and contained the following stipulation: "But it is agreed that the assignee cannot alienate in any manner whatsoever the said land, nor any part thereof, to any person without the express and written consent of the assignors under penalty of the nullity of the said deed." The property was subsequently seized by a judgment creditor of A. F., and appellant opposed the sale and asked that the seizure be declared null, because the property seized could not be sold by reason of the above prohibition to alienate.

Held, on appeal, affirming the judgment of the court below, that the deed was made in accordance with the provisions of 18 V. c. 250, and it being a purely onerous title on its face, the prohibition to alienate contained in said deed was void. Art. 970, C. C. L. C.

Query.—Whether the substitutes may not, when the substitution opens, attack the deed for want of sufficient consideration.

Fraser v. Poullot.—iv. 515.

Deed—Continued.**4. 9 V. c. 37, s. 17—Deed under, before notary—Validity of.**

Held, per Taschereau and Gwynne, JJ.—That a deed taken under 9 V. c. 37, s. 17, before a notary (though not under the seal of the commissioners) from a person in possession, which was subsequently confirmed by a judgment of ratification of a Superior Court was a valid deed, that all rights of property were purged, and that if any of the *auteurs* of the petitioner failed to urge their rights on the monies deposited by reason of the customary dower, the ratification of the title was none the less valid.

Chevrier v. The Queen.—iv. 1.

5. Of land—Construction of.

Held, per Strong, J.—Extrinsic evidence of monuments and actual boundary marks is admissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they call for courses, distances, or computed contents which do not agree with those in the deed.

Grassett v. Carter.—x. 105.

6. Intended to operate as mortgage.

See MORTGAGE, 9.

7. Varying original promise of sale.

See SALE OF LANDS, 9.

8. Of compromise—Action to set aside for fraud and coercion.

See PARTITION.

9. Missing—Evidence under law of N. S.—Certificate of registrar—Affidavit.

See EJECTMENT, 8.

10. Construction of—Title to lands—Estoppel—Trust—Fiduciary agents—Maintenance—32 H. VIII. c. 9.

Under the provisions of 8 G. IV. c. 1, generally known as the Rideau Canal Act, Lt.-Col. By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts part of 600 acres or thereabouts theretofore granted to one Grace McQueen as necessary for making and completing said canal, but only some 20 acres were actually used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to Wm. McQueen all his interest in the said lands, and on the 6th February, 1832, the said Wm. McQueen conveyed the whole of the lands originally granted to Grace McQueen to the said Col. By in fee for £1,200. The appellant, the heir-at-law of Wm. McQueen, by her petition of right sought to recover from the crown 90 acres of the land originally taken by Col. By, but not used for the purposes of

Deed—Continued.

the canal, or such portion thereof as still remained in the hands of the crown, and an indemnity for the value of such portions of these 90 acres as had been sold by the crown.

Held, per Ritchie, C.J.: By the deed of the 6th February, 1832, the title to the lands passed out of William McQueen; but assuming it did not, he was estopped by his own act and could not have disputed the validity and general effect of his own deed, nor could the suppliant who claims under him.

Per Strong, J.: By the express terms of the 3rd section of 8 G. IV. c. 1, the title to lands taken for the purposes of the canal vested absolutely in the Crown so soon as the same were, pursuant to the Act, set out and ascertained as necessary for the purposes of the canal, and all that Grace McQueen could have been entitled to at her death was the compensation provided by the Act to be ascertained in the manner therein prescribed, and this right to receive and recover the money at which this compensation should be assessed vested, on her death, in her personal representative as forming part of her personal estate. Therefore, as regards the 110 acres nothing passed by the deed of 6th February, 1832.

Per Strong, J.: This deed did not work any legal estoppel in favour of Col. By which would be fed by the statute vesting the legal estate in William McQueen, the covenants for title by themselves not creating any estoppel. But if a vendor, having no title to an estate, undertakes to sell and convey it for valuable consideration, his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards acquire, even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, or his heir-at-law, will be compelled to convey to such purchaser accordingly. In other words, the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. Therefore, if the suppliant were granted the relief asked, the land and money recovered by her would in equity belong to the heirs of Col. By.

Although nothing passed under the deed of the 6th February, 1832, yet the suppliant could not withhold from the heirs or representative of Col. By anything she might recover from the Crown under the 29th section of 7 V. c. 11, but the heirs or representatives of Col. By would in turn become constructive trustees for the Crown of what they might so recover by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.

Per Strong, J.: The deed of the 6th February, 1832, being in equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire, there is nothing in the statute 32 H. VIII. c. 9, or in the rules of the common law avoiding contracts savoring of maintenance, conflicting with this use of the deed.

Per Fournier, Henry, and Taschereau, JJ.: The deed of the 6th February, 1832, made before the passing of 7 V. c. 11, s 29, and five years after the crown had been in possession of the property in question, conveyed no interest in such

Deed—Continued.

property either to Col. By personally or as trustee for the Crown, and the title therefore remained in the heirs of Grace McQueen.

Per Fournier, Henry and Taschereau, JJ. : There could be no estoppel as against William McQueen by virtue of the deed of the 6th February, 1832, in the face of the proviso in 7 V. c. 11.

McQueen v. The Queen.—xvi. 1.

[In this case, the J. C. of the Privy Council refused leave to appeal].

11. Absolute in form but intended to operate as mortgage—
Evidence—Proof of intention.

See EVIDENCE, 62.

Delegation—Of authority by Attorney-General.

See CRIMINAL APPEAL, 1.

2. Of payment—Personal liability under.

See HYPOTHEC.

Delivery—Of railway iron.

See RAILWAYS AND RAILWAY COMPANIES, 1.

2. Of policy—Effect of.

See INSURANCE, LIFE, 5.

Demolition of Works—In province of Quebec, how demanded.

Held, that demolition of works completed may properly be demanded in a petitory action for the recovery of property and that the present action is one in the nature of a petitory action.

Joyce v. Hart.—l. 321.

Demurrage.

See SHIPS AND SHIPPING, 8.

Demurrer—In action of conversion against sheriff.

See CORPORATIONS, 5.

2. *Petition of right.*

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of P. W. jr., certain parcels of lands originally granted by letters patent from the Crown, dated 5th January, 1806, to P. W. senr., together with a sum of \$200,000, for the rents, issues and profits derived therefrom by the Government since the illegal detention thereof.

The Crown pleaded to this petition of right—1st, by demurrer, *defense au fonds en droit*, alleging that the description of the limits and position of the property claimed was insufficient in law; 2nd, that the conclusions of the

Demurrer—Continued.

petition were insufficient and vague; 3rd, that in so far as respects the rents, issues and profits there had been no signification to the Government of the gifts or transfers made by the heirs to the suppliants.

Held, that the objection taken should have been pleaded by *exception à la forme*, pursuant to Art. 116, C. C. P., and as the demurrer was to all the rents, issues and profits as well as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of P. W. jr.

Chevrier v. The Queen.—iv. 1.

3. Judgment on—When final judgment from which appeal lies.
See JURISDICTION, 9, 17, 18, 21, 67.
DAMAGES, 25.
 4. To action of damage for maliciously obtaining injunction.
See DAMAGES, 19.
 5. In action on order under Companies Act, 1862 (Imp.).
See CORPORATIONS, 15.
 6. To action of damages for malicious proceedings in insolvency.
See DAMAGES, 25.
 7. To return to mandamus.
See MANDAMUS, 6.
 8. The plea to jurisdiction of County Court—Prohibition.
See PROHIBITION, 4.
 9. Assignment of chose in action—Demurrer for want of parties—
Res judicata.
See PRACTICE, 25.
- Deposit**—In bank to credit of succession—Agency.
See BANKS AND BANKING, 4.
2. By insurance company in bank under provisions of R. S. C. c. 124 (Insurance Act)—Insolvency of bank—Priority.
See CROWN, 21.
 3. In election appeal—Return of—Dissolution of parliament before appeal heard—Effect of.
See ELECTION, 34.

Depository—Sale of goods by weight—Damage before weighing
—Possession retained by vendor—Arts. 1063, 1064, 1235,
1474, 1710, 1802, C. C.

Deputy Returning Officer—Conspiracy between, and respondent.
See ELECTION, 22.

Description—Of land by reference to plan.
See BOUNDARY.

2. By metes and bounds—When parcel of land granted by specific
name.
See EASEMENT.

Detinue—Action of.
See LIEN.

Deviation—Marine insurance—Delay in prosecuting voyage—
Enhancement of risk—Implied condition in contract.
See INSURANCE, MARINE, 28.

2. Construction of policy—Loading port on west coast of South
America—Guano Island—Commercial usage.
See INSURANCE, MARINE, 29.

3. From line of railway—Extension—Description in map or plan
—42 V. c. 9 (D.).
See RAILWAYS AND RAILWAY COMPANIES, 54.

Diocesan Fund—*Support of clergymen—Condition as to participation.*

The Diocesan Church Society of Nova Scotia holds a fund for distribution among the Church of England clergymen of the province, and one of the rules governing its distribution is that no clergyman receiving an income of \$1,000 and upwards from certain named sources shall be entitled to participate.

Held, affirming the judgment of the Supreme Court of Nova Scotia, 21 N.S. Rep. 309, that a rector was not debarred from participating in this fund because the salary paid to his curate, if added to his own salary, would exceed the said sum of \$1,000, his individual income being less than that amount.

Present:—Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Diocesan Synod of Nova Scotia v. Ritchie.—Mar. 10th, 1890—xviii. 705.

Director—Of company—Sale by to company—Ratification by shareholders.

See CORPORATIONS, 25.

Discretion—Of trial judge—Amount of damages—Interference by Court of Appeal.

See DAMAGES, 57.

2. Of judge—Appointment of liquidator—Insolvent bank—Right to appoint another bank.

See WINDING-UP, 10.

3. Judicial discretion—Jurisdiction to hear appeal—Order to stay proceedings—R. S. C. c. 135, s. 27.

See JURISDICTION, 91.

APPEAL, 14.

NEW TRIAL, 11.

Distress—*Exemption from*—*Replevin*.

W. let an unfurnished house to one Mrs. M. to be used as a boarding house. Mrs. M. applied to F. & Son for furniture, which they refused to supply unless W. would guarantee that it would not be distrained for rent. W. thereupon signed the following mem., which was delivered to F. & Son by Mrs. M.: "The bearer, Mrs. M., being about to purchase some furniture from Wm. F. & Son, and my rent being guaranteed, I hereby agree not to take the furniture so to be furnished by Wm. F. & Son for any rent that may become due." F. & Son then delivered the furniture to Mrs. M., the said furniture to be paid for by monthly payments, and "to remain the property of F. & Son till paid for in full." W. levied upon the furniture, F. & Son replevied and obtained a verdict, which the court below refused to set aside.

Held, that the mem. signed by W. constituted a binding contract or arrangement with F. & Son not to distrain, and that the judgment of the court below should be affirmed.

Wallace v. Fraser.—ii. 522.

2. For mortgage money.

See MORTGAGE, 4.

Distribution of Estate—*Statute*—*Repeal of*—*Restoration of former law*—*Distribution of intestate estate*—*Feme covert*—*Husband's right to residuum*—*Next of kin*.

The Legislature of New Brunswick, by 26 Geo. III. c. 11, ss. 14 & 17, re-enacted the Imperial Act, 22 & 23 Car. II. c. 10 (Statute of Distributions) as explained by s. 25 of 29 Car. II. c. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estates as theretofore.

When the statutes of New Brunswick were revised in 1854 the Act 26 Geo. III. c. 11, was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme covert*

Distribution of Estate—Continued.

her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission.

Held, that the personal property passed to the husband and not to the next of kin of the wife.

Per Strong, J.—The repeal by the Revised Statutes of 26 Geo. III. c. 11, which was passed in the affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law of New Brunswick.

Per Gwynne, J.—When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. III. c. 11 (N.B.), it was not necessary to enact the interpreting section of the Statute of Frauds, and its omission in the Revised Statutes did not effect the construction to be put upon the whole Act.

Held, *per Ritchie, C.J., Fournier, Gwynne and Patterson, JJ.*, that the Married Woman's Property Act of New Brunswick (C. S. N. B. c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed.

The Supreme Court of New Brunswick while deciding against the next of kin on his claim to the residue of the estate of a *feme covert*, directed that his costs should be paid out of the estate. On appeal the decree was varied by striking out such direction.

Lamb v. Cleveland.—xix. 78.

Divorce—*Decree for, obtained in State of New York—In force in Quebec—Effect of submitting to jurisdiction of foreign court—Domicile of parties—Right of wife to sue (ester en jugement) in Quebec without authorization—Art. 14, C. C. P.*

Appeal from a judgment rendered by the Court of Queen's Bench (appeal side) in Montreal, on the 19th day of September, 1883, reversing a judgment of the Superior Court rendered on the 25th of February, 1882.

The facts of the case may be summed up as follows:

On the 7th of May, 1871, the appellant (Virginia Gertrude Stevens) and respondent (Henry Julius Fisk) both being domiciled in the city of New York, were duly married in that city without ante-nuptial contract. By the laws of the state of New York no community of property is created between persons married there without ante-nuptial contract, and the wife holds and acquires property in her own name, entirely free from marital control, as if she were a *feme sole*.

Before and at the time of her marriage with the respondent, the appellant had a fortune in her own right, amounting to \$220,775.74, inherited from her father, and consisting of cash, bonds and other moveable property. On

Divorce—Continued.

the 8th of January, 1872, the appellant received this fortune from her trustees, and thereupon placed it in the hands of the respondent, who administered and controlled it until the 25th day of September, 1876. The respondent kept his domicile in New York for about eighteen months after the marriage, when he suddenly removed to Montreal, where he established himself in business, and where he has resided ever since. The appellant accompanied her husband to Canada in 1872, but does not appear to have actually resided there for much more than a year. Since 1872 the appellant lived alternately in Paris and in New York. In 1876, being dissatisfied with her husband's administration of her fortune, she demanded the return of her securities, and obtained a small portion of them. In the latter part of February, the appellant, being then a resident of the state of New York as required by the laws of that state, instituted proceedings for divorce before the Supreme Court of New York, on the ground of her husband's adultery. The respondent was personally served with process in Montreal, and appeared in the suit by his attorneys, who were present at every step in the procedure, but filed no plea to the demand. In December, 1880, the appellant obtained from that court a decree of divorce absolute in her favour, on the ground of her husband's adultery. The effect of this decree, according to the laws of New York, was to dissolve the marriage tie, and to place the appellant in the same position as if she had never been married.

On the 29th August, 1881, the appellant, after fruitless endeavours to obtain from the respondent an account of his gestion, took the present action in the Superior Court at Montreal to force him to render an account.

The chief ground of defence raised by the respondent in his pleas were : 1st. That the appellant was still his wife, and, 2nd, that she was not authorized to institute the present action.

The Superior Court overruled the defendant's pleas, and held that the divorce alleged in the declaration was good and valid in the province of Quebec : 5 Leg. News, 79 ; but the Court of Queen's Bench, by a majority of a single judge reversed this judgment, on the ground that the alleged divorce had no force in the province of Quebec, and that, consequently, the plaintiff, being still the wife of the defendant, could not institute her proceedings without marital or judicial authorization : 6 Leg. News, 329.

On appeal to the Supreme Court of Canada, **Held**, Strong, J., dissenting,

1. *Per Ritchie, C.J., and Henry and Gwynne, JJ.*, that under the circumstances the decree obtained by the appellant from the Supreme Court of New York should have been recognized as valid by the courts of the province of Quebec.

2. *Per Fournier, Henry and Gwynne, JJ.*, that it was not necessary for the appellant, a foreigner, to obtain the authorization required by Arts. 176 or 178, C. C. in order to sue (*ester in jugement*) as in her own country, such authorization was not necessary : Art. 14, C. C. P.

Per Ritchie, C.J.—The evidence established that the plaintiff had a sufficient residence in New York to enable her to obtain under the law of New York a valid divorce there, and that she did in accordance with the law of

Divorce—Continued.

the state of New York without fraud or collusion, obtain such divorce from a court competent to pronounce it. That if the question of jurisdiction turns on the question of the husband's domicile, the burthen was on the husband of showing that he had actually changed his domicile *animo et de facto*. Having been cited before the court of New York, and having appeared in the suit and submitted to and not disputed the jurisdiction of the court, the legitimate presumption against him was that he had not changed his domicile *animo et de facto*. That independent of any question of domicile, he having appeared and submitted to and not questioned the jurisdiction, was bound by the decree and should not be allowed to affirm that the court had no jurisdiction to pronounce it, and to claim that the marriage dissolved in New York in a proceeding to which he was an unobjecting party, and which he had never before questioned, was subsisting in Quebec.

Strong, J., dissenting.—Was of opinion that as regards the question as to the validity of the divorce, the Court of Queen's Bench was perfectly right.

As regards the other question, one peculiar to French law, that as to the plaintiff's right to institute and maintain the action without the authorization of justice, from the best consideration he had been able to give the point he was of opinion the court below was right in that also.

The judgments of Gwynne and Henry, JJ., will be found reported at length in 8 Legal News, p. 42, and the judgment of Fournier, J., in the same volume at p. 53.

Appeal allowed with costs.

Stevens v. Fisk—12th January, 1885.

Dog—Injury committed by—Ownership—Scienter—Evidence for jury.

See DAMAGES, 59.

Dol personnel.

See SHERIFF, 5.

Domicile—Of wife for purpose of taking proceedings for divorce.

See DIVORCE.

2. *Matrimonial—Declaration in act of marriage—Civil status—Arts. 63, 65, 79, 80, 81, 83, C. C. (P.Q.)*

In or about 1822, W., a native of Ireland, came to Canada and was employed as a shantyman on the Bonnechère, in the Province of Upper Canada. In 1827 he got out timber for himself, and in 1828, while in Quebec, where he was in the habit of going every summer with rafts of timber, he was engaged to be married to one M. Q., the widow of one McM., in his lifetime of Upper Canada. W. was married to the widow in the month of September and shortly after his marriage he returned to the Bonnechère to carry on lumbering operations there as formerly, and on his way up left his wife and daughter in the neighbourhood of Aylmer, in Lower Canada. In the

Domicile—Continued.

winter he came down for her and brought her to his home on the Bonnechère and lived there for ten or twelve years and acquired considerable wealth. W. declared in the presence of the priest who performed the ceremony that he was a *journalier de la Province de Québec*, and he was so described in the certificate of marriage. M. Q. having died without a will, W. married again, and by his will left his property to his second wife, the appellant. The respondents by their action claimed there was community of property between M. Q., their grandmother, and W. according to the laws of Lower Canada, and demanded their share of it in right of heirship. The appellant disputed this claim, contending there was no community.

Held, reversing the judgment of the court below, Fournier and Taschereau, JJ., dissenting, that the facts of the present case were not sufficient to prove that W. had acquired a domicile in the Province of Quebec at the time of his marriage. Also, that the certificate, *acte de mariage*, has only relation to residence in connection with matrimonial domicile, and therefore has relation to the ceremony of marriage and its validity alone, and not to domicile in reference to the civil status of the parties.

Wadsworth v. McCord.—xii. 466.

[On appeal to the Judicial Committee of the Privy Council the judgment of the majority of the Supreme Court was affirmed. The Judicial Committee held—1. That the *acte de mariage* signed in 1828 did not amount to a binding declaration by the husband that he was domiciled in Lower Canada with the legal effect of a contract that the wife should be *commune en biens* with him. Domicile for purposes of marriage in Art. 68, C. C., is used in the sense of residence. 2. Art. 1260, C.C., is subject to Art. 6. If no covenants are made, the consorts, so far as the code applies, are presumed to have subjected themselves to the legal community of property. But movable property is governed by the law of the owner's international domicile. See 14 Appeal Cases, 631.]

3. Under Art. 476, C. C. P. (P.Q.), it is not necessary to serve a judgment *en declaration d'hypothèque* on a defendant who is absent from the province, or who has no domicile therein.

Dubuc v. Kidston.—xvi. 357.

And see PRACTICE, 3.

Dominion Lands Act, The—

See PATENT.

Donation—Articles 803, 1034, C. C. (P.Q.)—Donation in marriage contract—Proof of insolvency of donor at date of donation necessary to set aside.

On the 27th June, 1876, L., *et al.*, sold to M. T. a property for \$12,350, of which price \$8,789 were paid in cash. On 16th June, 1879, E. T., daughter of M. T., married J. K., and in their contract for marriage M. T. made a dona-

Donation—Continued.

tion to his daughter, E. T., of certain property of considerable value, and remained with no other property than that sold to him by L. *et al.*

In July, 1881, L. *et al.* brought an action to set aside the gift in question, claiming that the property sold having become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them and secured only by the property so sold, the gift in this marriage contract had reduced M. T. to a state of insolvency, and had been made in fraud of L. *et al.*, and that at the time the gift was made M. T. was notoriously insolvent.

M. T. pleaded, *inter alia*, denying averments of insolvency, fraud or wrong-doing.

The only evidence of the value of the property still held by M. T. at the date of the donation, 16th June, 1879, was the evidence of an auctioneer, who merely spoke of the value of the property in November, 1881, and that of a real estate agent, who did not know in what condition the property was two years before, but stated that it was not worth more than \$6,000 in November, 1881, adding that he considered property a little better now than it was two years before, although very little changed in price.

Held, reversing the judgment of the court below, that in order to obtain the revocation of the gift in question, it was incumbent on the plaintiffs to prove the insolvency or *déconfiture* of the donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged.

Treacey v. Laggett.—ix. 441.

2. **Title to land—Gift *inter vivos*—Subsequent deed—Giving in payment—Registration—Arts. 806, 1592, C. C.**

The parties to a gift *inter vivos* of certain real estate with warranty by the donor did not register it, but by a subsequent deed which was registered changed its nature from an apparently gratuitous donation to a deed of giving in payment (*dation en paiement*). In an action brought by the testamentary executors of the donor to set aside the donation for want of registration:

Held, affirming the judgment of the court below, that the forfeiture under Art. 806, C. C. resulting from neglect to register applies only to gratuitous donations, and as the deed in this case was in effect the giving of a thing in payment, (*dation en paiement*) with warranty, which under Article 1592, is equivalent to sale, the testamentary executors of the donor had no right of action against the donee based on the absence of registration of the original deed of gift *inter vivos*.

Lacoste v. Wilson.—xx. 218.

Dower—Bar of, in mortgage—Non-registration of prior mortgage in which dower not barred—Sale of mortgaged land—Claim by wife to proceeds after payment of mortgage having prior claim by virtue of registration.

See MORTGAGE, 29.

Dower—*Continued.*

2. Grant from local government of foreshore of harbour—Conveyance by grantee—Claim of dower by wife of grantee—Plea that grant void—Estoppel.

See ESTOPPEL, 19.

Drains—Municipal corporation—Drainage of lands—Injury to other lands by—Remedy for—Arbitration—Notice of action—Mandamus—Ont. Municipal Act, R. S. O. 1887, c. 184, ss. 483, 569—Ont. Judicature Act, R. S. O. 1887, c. 44.

See MUNICIPAL CORPORATION, 26.

2. Municipal Corporation—Drainage of lands—Non-completion of works—Maintenance and repair—Notice—Mandamus—Ont. Municipal Act, R. S. O. 1887, c. 184, s. 583.

See MUNICIPAL CORPORATION, 27.

Duties—Customs—Article imported in parts—Rate.

See CUSTOMS DUTIES.

2. Customs laws—Tea in transit through the United States to Canada—Tariff Act (1886), item 781—52 V. c. 14 (D.).

See CUSTOMS DUTIES, 2.

E.

Easement—*Grant of servient tenement—Implied reservation—Implied grant—Plan—Evidence—Boundaries—Description—Riparian proprietor—Diversion of water.*

Held, that one piece of land cannot be said to be burdened by an easement in favour of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parcels comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact—*quasi easements*.

Easement—Continued.

If the *quasi* servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent.

If the dominant tenement is first granted, all *quasi* easements which have been enjoyed as appendant to it over a *quasi* servient tenement retained by the grantor, pass by implication.

Besides the lands the title to which was derived from their common grantor, the appellant was proprietor of another piece of land, called Block A., situated on the opposite side of the river Maitland, the boundary of said block on the river side being high water-mark.

Held, that the lateral or riparian contact of the land with the water would suffice to entitle the appellant to object to any unauthorized interference with the flow of the river in its natural state.

In 1859 the then owners of part of the lands in question had a plan prepared and registered, and in 1871 they conveyed a parcel which they described as block F.

Held, that it must be presumed they intended to convey the same parcel of land shown on said plan as block F., with the same natural boundaries as those therein indicated.

Held, that the evidence of professional draughtsmen was properly admitted to show what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plan were intended to indicate.

When a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is known.

Attrill v. Pratt.—x. 425.

2. Registration of deed creating—Rev. Sts. (N.S.) 4th series, c. 79, ss. 9 & 19.
See TRESPASS, 5.
3. *Light and air—Twenty years' uninterrupted use of—Prescription—Misdirection—Damages, measure of.*

Action on the case for obstructing plaintiff's lights. The plaintiff and defendant were owners of contiguous houses. The defendant's house was built some time prior to 1853 for one Burns, who in April of that year sold and conveyed it to one Seely, who afterwards deeded to one Hogan, from whom the plaintiff purchased under a registered deed. In the summer of 1853, whilst the defendant's house was in the occupation of one Mrs. Ranney

Easement—Continued.

a tenant of Seely, the house owned by the plaintiff was built for one Adams from whom, through several meane conveyances, the plaintiff derived his title. In the fall of 1853, whilst the plaintiff's house was in course of erection, two windows were placed in the gable end of it to afford light and air to the bedrooms in the attic. These windows overlooked the house which Burns had erected. Mr. Adams began to live in the house about December, 1854. The windows remained where they were placed and unobstructed until August, 1874, when the defendant, by raising his house and putting a mansard roof upon it, caused the obstruction complained of, by closing up the lower half of the windows.

There was no evidence of an express grant of an easement, the plaintiff relying upon the fact of twenty years' uninterrupted enjoyment as entitling him to recover. For the defendant it was shown by Seely that he never gave Adams permission to put the windows there, and also that he did not notice them till after he had parted with his title (which was in 1857). Seely stated, however, that he saw Adams' house being built. The defendant swore that he had examined the county records, and that there was no grant of an easement in the lights in question on record. He also testified that he was ignorant of the windows when he bought, which was in the spring of 1874, and did not know of them till the obstruction was made. The evidence was not certain as to when Mrs. Ranney's tenancy terminated. No question appears to have been raised at the trial as to the time her lease terminated, nor was this point left to the jury, the contention of the plaintiff's counsel being that the time began to run from the period when the windows were put in, and that the tenancy had nothing to do with the question.

The learned Chief Justice of New Brunswick before whom the case was tried, directed the jury that "if Mr. Seeley, the owner of the land, did not occupy the land himself, but it was occupied by his tenants, then he would not be bound by the user, unless he knew of the windows being there: if he knew of the windows being there, and did not obstruct them within twenty years, he would be bound, and the tenancy had nothing to do with the question."

And as to the measure of damages the learned Chief Justice charged that: "The fair measure would be what it would cost the plaintiff to make such alterations in his house as would admit the same quantity of light and air as he had before the defendant raised his roof."

The jury found a verdict for the plaintiff for \$400.

A rule *nisi* for a new trial was discharged.

On appeal to the Supreme Court of Canada, **Held**, 1. That the duration of Mrs. Ranney's tenancy was a proper question for the jury, and it should have been left to them without the qualification that it made no difference if Seely had knowledge of the existence of the windows; for if the tenancy continued subsequently to August, 1854, there was manifestly no user for twenty years with the consent or acquiescence of the defendant and those through whom he claimed, for Seely, the then owner of the fee, would have had no right to enter upon the possession of his tenant for the purpose of obstructing the lights.

Easement—Continued.

2. There was also a misdirection as to the measure of damages; the plaintiff should have been limited to the recovery in respect of the loss and inconvenience caused by the darkening of his windows up to the time when the action was brought, and for future damages he could bring successive actions from time to time as long as the nuisance continued.

The court below went at length into the question regarding the nature and effect of the presumption of a lost grant arising from twenty years use of an easement, and the right of rebutting such presumption by evidence, and also dealt with the question as to the effect of a registered conveyance upon a title to an easement founded upon such a presumption. See the case as reported in 2 Pugs. & Burb. 508. As to the first of these questions see *Angus v. Dalton*, 6 App. Cases, 740.

Appeal allowed with costs and rule *nisi* for a new trial made absolute.

Pugsley v. Ring.—12th December, 1879.

4. Interference with public navigable waters—Crown grant—
Trespass.

See NAVIGATION, 4.

5. *Trespass—Disturbing enjoyment of right of way—User—
Easement.*

E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in this right of way was in S., but E. founded his claim to a user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots.

Held, affirming the judgment of the Supreme Court of Nova Scotia, 19 N. S. Rep. 222, Ritchie, C.J., and Gwynne, J., dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action.

Ells v. Black.—June 20, 1887—xiv. 740.

6. *Easement—Adjoining lands—Way of necessity—License—
Prescription—Agreement for right of way—Construction of.*

In an action for obstructing a right of way the plaintiff claimed the use of such right both by prescription and agreement, and also claimed that by the agreement the way was wholly over defendant's land. The evidence on the trial showed that plaintiff had acquired the land from his father who retained the adjoining land which was eventually conveyed to defendant, and that after so acquiring it the plaintiff continued to use a track or trail over the adjoining land, and mostly through bush land, to reach the concession line, and his claim to the use of the way by prescription depended on whether or not his user was of a well-defined road, or merely of an irregular track and by license and courtesy of the adjoining owner. Finally an agreement was entered into between the plaintiff and his brother, who had acquired the adjoining lot

Easement—Continued.

which he afterwards conveyed to defendant, by which, in consideration of certain privileges granted to him, the brother covenanted to permit plaintiff to have a right of way along a lane to which the way formerly used led, and extending forty rods east from the centre of the lot, so as to allow plaintiff free communication from defendant's lot along said lane to the concession line. The issue raised on the construction of this agreement was, whether the right of way granted thereby should be wholly or in part on plaintiff's land, or wholly on that of the defendant.

Held, reversing the judgment of the Court of Appeal for Ontario, 16 Ont. App. R. 8, and restoring that of the Divisional Court, 15 O. R. 699, Ritchie, C.J., dissenting, that plaintiff had no title to the right of way by prescription, the evidence clearly showing that the user was not of a well-defined road but only of a path through bush land and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death: but,

Held, affirming the judgment of the Court of Appeal, that under the agreement the right of way granted to the plaintiff was wholly over defendant's land, the agreement not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor.

Present: Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Rogers v. Duncan.—Nov. 10, 1890—xviii. 710.

7. Use of body of water—British Columbia—Land ordinance, 1865—Right to exclusive use.

See RIPARIAN PROPRIETORS, 5.

Edit de Secondes Noces, 1560.

See COMMUNITY.

- Education**—Educational Institution in City of Montreal—Exempt from taxation—Cons. S. L. C. c. 15—41 V. c. 6, s. 26—Art. 712, Mun. Code (Q.).

See ASSESSMENT AND TAXES, 13.

2. Educational Institution—Property held by, as a farm—Proceeds used at another house—Not exempt from School Taxes—32 V. c. 16, s. 13 (Q.)—C. S. L. C. c. 15, s. 77.

See ASSESSMENT AND TAXES, 14.

3. *Con. Stats. L. C. c. 15, ss. 31 & 33—40 V. c. 22, s. 11 (P.Q.)—Construction of—33 V. c. 25, s. 7 (P.Q.)—Erection of a School House—Decision of Superintendent—Mandamus.*

Under 40 V. c. 22, s. 11, the Superintendent of Education for the Province of Quebec, on an appeal to him from the decision of the school commissioners

Education—Continued.

of St. Valentin, ordered that the school district of the municipality of St. Valentin should be divided into two districts with a school house in each.

The school commissioners by resolution subsequently decreed the division, and a few days later, on a petition presented by ratepayers protesting against the division, they passed another resolution, refusing to entertain the petition. Later on, without having taken any steps to put into execution the decision of the Superintendent, they passed another resolution, declaring that the district should not be divided as ordered by the Superintendent, but should be re-united into one.

In answer to a peremptory writ of *mandamus* granted by the Superior Court ordering the school commissioners to put into execution the decision of the Superintendent of Education, the school commissioners (respondents) contended that they had acted on the decision by approving of it, and that as the law stood they had power and authority to re-unite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the superintendent.

Held, reversing the judgment of the Court of Queen's Bench (appeal side) that the commissioners having acted under the authority conferred upon them by Con. Stats. L. C. c. 15, ss. 81 & 88, and an appeal having been made to the Superintendent of Education, his decision in the matter was final: 40 V. c. 22, s. 11 (P.Q.), and could only be modified by the Superintendent himself on an application made to him under 88 V. c. 25, s. 7; and, therefore, that the peremptory *mandamus* ordering the respondents to execute the Superintendent's decision should issue.

Tremblay v. School Commissioners of St. Valentin.—

8th March, 1886.—xii. 546.

4. Educational Institution—Special Assessment for Drain-Exemption—41 V. c. 6, s. 26 (Q.).

See ASSESSMENT AND TAXES, 18.

5. Laws with respect to—Legislative authority over—B. N. A. Act s. 93, s-s. 1—Rights prejudicially affected—33 V. c. 3 (D.)—53 V. c. 38 (Man.).

See LEGISLATURE, 21.

6. School Commissioners—*Mandamus*—Establishment of new school district—Superintendent of Education, jurisdiction of upon appeal—Approval of three visitors—40 V. c. 22, s. 11 (P.Q.)—R. S. Q. Art. 2055.

Upon an application by appellant for a writ of *mandamus* to compel the respondents to establish a new school district in the parish of Ste. Victoire in accordance with the terms of a sentence rendered on appeal by the Superintendent of Education under 40 V. c. 22, s. 11 (P.Q.), the respondents pleaded *inter alia* that the superintendent had no jurisdiction to make the order, the

Education—Continued.

petition in appeal not having been approved of by three qualified school visitors. The decree of the superintendent alleged that the petition was approved of by one L., inspector of schools, as well as by three visitors. Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side) that the petition in appeal must have the approval of three visitors qualified for the municipality where the appeal to the superintendent originated, and as one of the three visitors who had signed the petition in appeal was parish priest of an adjoining parish, and not a qualified school visitor for the municipality of Ste. Victoire, the sentence rendered by the superintendent was null and void.—Taschereau, J., dissented on the ground that as the decree of the superintendent stated that L., the inspector of schools, was a visitor, it was *prima facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with. C. S. L. C. o. 15, s. 25; Arts. 1863, 1864, R. S. Q.

Hus. v. The School Commissioner for the Municipality of the Parish of Ste. Victoire. —xix. 477.

Ejectment.

See WILL, 2.

LETTERS PATENT.

2. Powers of Chancery in action of—R. S. O. c. 40, s. 87.

See POSSESSION, 5.

3. *Missing deed—Evidence of execution and delivery of—Certificate of registrar of deeds—Affidavit of search—Estoppel.*

Action of ejectment. The action was twice tried. Plaintiffs, executors of original plaintiff, claimed title under a deed dated 18th June, 1856, which Hugh McMaster, deceased, the former owner of the land in question, was alleged to have executed, conveying said land to his son, Ronald McMaster, who, on the 19th April, 1869, mortgaged to the original plaintiff. This mortgage having been foreclosed, the land was purchased by the mortgagee at sheriff's sale.

At the trial plaintiff's counsel tendered a copy of the deed of the 18th June, 1856, certified to be a true copy by the registrar of deeds, and accompanied by an affidavit of one of the plaintiffs to the effect:

"That the original deed of which the paper writing hereunto annexed, marked A, is a copy certified under the hand of the late registrar of deeds, in and for the said county of Inverness, is not in my or my co-plaintiff's possession, or under our control; and I further say that we have inquired for, and been unable to procure the same."

Donald McMaster, a son of the original owner, and one of the witnesses to the deed, gave the following evidence:

"I went to the registry of deeds office, and proved the deed from my father, Hugh McMaster, to Ronald McMaster, his son. It was registered 17th June, 1856. I took the deed to the registry office and left it there. * *

Ejectment—Continued.

* I am not aware of Ronald's knowledge of the deed from my father." Ronald swore that he never saw the deed and never heard of it until a few years before the first trial in October, 1880.

It was agreed that plaintiff should become non-suited with leave to move to set the non-suit aside, and in case the court should think the non-suit wrong, the court to enter a verdict for plaintiff.

The Supreme Court of Nova Scotia (Macdonald, C.J., and Rigby, Smith, and Weatherbe, JJ.) were divided, Rigby and Weatherbe, JJ., being of opinion that the presumption was that Hugh McMaster, the original owner, having signed the deed, delivered it to Donald to take to the registry office to be proved and registered; that by this registration he gave notice to all the world that he had conveyed the land to Ronald, and that there was evidence for a jury: that by his conduct in relation to the conveyance to Ronald he had induced the original plaintiff to accept the mortgage from Ronald, believing the title to be vested in Ronald by virtue of the deed. Therefore the defendant, who also claimed through his father, was estopped from denying the due execution of the deed. Macdonald, C.J., and Smith, J., were of opinion there was not sufficient evidence of the execution of the deed.

On appeal to the Supreme Court of Canada, **Held**, that there was sufficient evidence to establish the due execution and delivery of the deed to Ronald. The copy having been received in evidence without objection, it was too late to object to its admissibility. Strong, J., *dubitante*.

Appeal allowed with costs, and a verdict directed to be entered for plaintiffs.

McDonell v. McMaster.—22nd June, 1885.

4. Title to land—Old grant—Loss of original surveys—Starting point to define metes and bounds, how ascertained.

See BOUNDARY, 3.

5. *Action for recovery of land—Conveyance by husband to wife set aside as fraudulent—Statement in pleadings as to possession in wife—Sale by sheriff as against husband—Irregularities in—Trial of action after pleadings maintained on demurrer.*

The respondent (the plaintiff), Charles Magee, brought an action of ejectment in the High Court of Justice for Ontario, Chancery Division, against the appellant, Annie Kane, and her husband, James Kane, to recover possession of lot number 11 on the west side of Nicholas street, in the city of Ottawa. The case was tried at Ottawa before the Honourable Mr. Justice Ferguson, who, after hearing the evidence and argument of counsel, reserved his decision, and afterwards gave judgment in favour of the plaintiff against the defendants for possession of the land in question. The facts of the case will be found fully reported in 14 Ont. R. 226.

The defendant, Annie Kane, thereupon appealed direct to the Court of Appeal, which Court affirmed the judgment of his lordship.

Ejectment—Continued.

The judgment of the Court of Appeal was delivered by Burton, J.:—He was of opinion that Mrs. Kane, having been treated as herself having possession, had the same right to defend the possession thus attributed to her as if a stranger to the plaintiff and not his wife. Rule 144 made it sufficient for her to state by way of defence that she was in possession, and dispensed with a plea of title on her part, unless her defence depended upon an equitable estate or right, or unless she claimed relief upon any equitable ground. Her defence was partly of the character which had to be specially set out, alleging irregularities, or faults of omission and commission in the conduct of the sheriff, in the conduct of the sale under *fi. fa.* against James Kane; but without doubting the correctness of the view taken of the alleged acts and omissions, Mrs. Kane could not be heard to criticise those proceedings; as far as she was concerned the plaintiff owned the interest professed to be conveyed by the sheriff, and that included whatever right her husband had to possession of the property. The contest, therefore, turned on the sufficiency of the evidence concerning the title of James Kane. There was no direct evidence, but sufficient was shewn to enable the plaintiff to recover, in the absence of any title in Mrs. Kane, in the proceedings and adjudication in the former action between the plaintiff and Mrs. Kane, in which the conveyance from James Kane to his wife was declared fraudulent and void under 13 Eliz. c. 5. The plaintiff's position at the trial after production of these proceedings was the same as if he had put in evidence the patent from the Crown to James Kane and then proved, as he did, his acquisition of James's interest in the land. The plaintiff did not, on the evidence, require to resort to the judgment on the demurrer, but Mr. Justice Burton did not wish to be understood as intimating any doubt of the correctness of that judgment. The gravamen of the demurrer was that the statement did not allege title in James Kane. It did allege the former action and judgment, but their bearing on the admission of title in James was not so apparent as it might have been. An application such as that in *Philipps v. Philipps*, 4 Q.B.D. 127, might have led, as in that case, to a better statement being ordered, but that is a very different thing from holding the pleading bad on demurrer.

In his view of the evidence, it became unnecessary to express any opinion on the application of decisions like *Johnsson v. Bonhote*, 2 Ch. D. 298.

On appeal to the Supreme Court of Canada it was Held, that although Anne Kane might set up the irregularities and defects in the sheriff's sale her allegations were such that she could not do so without making the sheriff a party; but the findings of the learned Judge who tried the action on the question of irregularity and of value were correct. The proof of title also was sufficient; and the appeal should therefore be dismissed.

Present: Ritchie, C.J., and Strong, Taschereau and Gwynne, JJ.

Kane v. Magee.—4th December, 1889.

Election—Clerical undue influence.

Held, that the election of a member for the House of Commons guilty of clerical undue influence by his agents is void. That sermons and threats by certain parish priests of the county of Charlevoix amounted in this case to

Election—Continued.

acts of undue influence, and where a contravention of the 95th section of the Dominion Elections Act, 1874.

Per Ritchie, J.: A clergyman has no right, in the pulpit or out, by threatening any damage, temporal or spiritual, to restrain the liberty of a voter so as to compel him into voting or abstaining from voting otherwise than as he freely wills.

Charlevoix Election Case, Brassard v. Langevin.—i. 145.

2. Admissibility of respondent's evidence (P.Q.)—Multiplicity of charges—Bribery and undue influence—Agency—Drinking on nomination and polling days.

The petition was in the usual form, charging bribery and corruption on behalf of respondent and of his agents; and treating by respondent's agents on the nomination and polling days. In the bill of particulars the petitioners formulated ninety-eight different charges, but, in appeal, they only insisted upon seventeen charges, seven of which attached personally to the defendant, and ten to his agents. The respondent was examined on his own behalf, and there were, in all, 280 witnesses heard.

The judgment of the Superior Court of the District of Montreal, dismissing the petition on all the charges, was unanimously affirmed, except as to the charge of bribery and undue influence by one Robert, hereafter more particularly referred to.

It was **Held**, 1st. That the evidence of a candidate on his own behalf, in the province of Quebec, is admissible.

2nd. That when a multiplicity of charges of corrupt practices are brought against a candidate, or his agents, each charge should be treated as a separate charge, and, if proved by one witness only, and rebutted by another, the united weight of their testimony, without accompanying or collateral circumstances to aid the court in its appreciation of the contradictory statements, cannot overcome the effect of the evidence in rebuttal, and that, in such a case, the candidate is entitled to the presumption of innocence to turn the scale in his favour.

3rd. That drinking on the nomination or polling day is not a corrupt practice sufficient to void an election, unless the drink is given by an agent on account of the voter having voted or being about to vote: 39 V. c. 9, s. 94 (D.), compared with 17 & 18 V. c. 102, ss. 4, 23 & 36 (Imp.).

4th. That a candidate, charged by his opponent with having no influence, is not guilty of a corrupt practice, if, in a public speech, in reply to the attack, he states "that he had had influence to procure more appointments for the electors of the county than any member."

The evidence on the Robert charge was to the following effect: Robert, long before the election was thought of, together with members of his family (the Paré family), exhibited a strong desire to obtain an employment for his brother-in-law, one Edward Honoré Ouellette. Robert, being a political supporter, a client and a personal friend of Mr. Laflamme, asked him on different occasions if he could procure his brother-in-law (Ouellette) a place. The first

Election—Continued.

time he spoke to him with reference to it was about a year previous to the election; but he did not say anything to him on that occasion about his father-in-law (Paré). Robert's evidence on this part of the case then goes on as follows: "Q. On what occasion did you speak to him (Mr. Laflamme) about it? A. It was when the question of an election arose that I spoke to him about it. Q. Last fall? A. Yes. Q. What was the date at which you spoke to him regarding the Paré family? A. I cannot positively say, but it was four or five weeks before there was question of the election. It was then spoken of in the county and out of the county. Q. That was during the election? A. Yes. Q. At all events, it was at the time the election was spoken of? A. Yes. Q. What did you say to him regarding your brother-in-law and your father-in-law? A. I went to see Mr. Laflamme on different occasions, when I had some accounts to give him to collect, and I said to him: 'It would greatly please the Paré family if you could procure a place for my brother-in-law.' Q. Did you say to Mr. Laflamme in what way it would please the Paré family? A. I said this to him: 'It might, perhaps, prevent them from voting at the coming election.' Q. When you told Mr. Laflamme that the Paré family could be useful to him by not voting, what did Mr. Laflamme say? A. He simply told me 'that he would think of me, and that if a vacancy occurred, he would do his best for me.' Mr. Laflamme, on the other hand, states: 'He (Robert) had asked me, not during the election, but many months before, I believe, so far as my memory goes, a year before there was any talk of an election, to try and secure some office or occupation, with a slight remuneration, for his brother-in-law (Mr. Ouellette). I told him that I would consider his claims; that he was one of my best supporters; and, if I saw any occasion where it would be possible for me to support his claim, I would do so. The thing remained in that way; and previous to the election particularly, there was never one word said or breathed on that subject between Mr. Robert and myself. I never asked him to use this promise, and never intended to do so; it was merely because he was a personal friend of mine and a man of respectability and importance that I promised to consider his claim, as I was justified as the representative of the county in doing.'" Evidence was given that Robert attended three or four meetings of respondent's committee, organized at Lachine; that he checked lists and reported his acts to some of the members of the committee. Before the election, Robert repeated to the Paré family what had taken place between him and Mr. Laflamme. At the time of the election, Robert, while conversing with the Parés in the family circle, was informed by one of them "they would vote for Girouard (the defeated candidate) but that they would not make use of their influence." He then told them "Do as you please; they will use your votes as an objection to giving Mr. Ouellette a place." This conversation was not reported by Robert to any member of the respondent's committee.

Held, 1. That the respondent, having a perfectly legitimate motive in promising Robert to try and get an office for his brother-in-law—his desire to please a political friend and supporter—was not guilty of a corrupt act in making such promise; and further, that the act of Robert, in relation to the votes of the Paré family, even if a corrupt one, was not committed with the knowledge and consent of the respondent.

Election—Continued.

2. That whether Robert was respondent's agent or not, the conversations which took place between him and the Paré family do not sufficiently show a corrupt intent on his part to influence their vote, and that he is not guilty of bribery or undue influence within the meaning of the statute.—(Richards, C.J., and Strong, J., dissenting).

Per Richards, C.J., and Strong, J.—There was sufficient evidence to declare Robert to be one of respondent's agents. (Henry, J., dissenting).

Jacques Cartier Election Case, Somerville v. Laflamme.—ii. 216.

3. Preliminary objections—Appeal on.

See JURISDICTION, 7.

4. *Dominion Parliament, plenary powers of legislation of—The Dominion Controverted Elections Act, 1874—Jurisdiction of Provincial Superior Courts—Power of Dominion Parliament to alter or add to civil rights—Procedure—British North America Act, 1867, ss. 18, 41, 91, s-ss. 13 & 14 of s. 92, and ss. 101 & 129—Dominion Court.*

The Dominion Parliament, by "The Dominion Controverted Elections Act, 1874," imposed on the Provincial Superior Courts and the judges thereof the duty of trying controverted elections of members of the House of Commons. After the general elections of 1878, the respondent filed an election petition in the Superior Court for Lower Canada, against the return of the appellant as the duly elected member for the electoral district of Montmorency for the House of Commons. The appellant objected to the jurisdiction of the court held by Meredith, C.J., on the ground that "The Dominion Controverted Elections Act, 1874," was *ultra vires*.

Held, affirming the judgment of Meredith, C.J., 1st. That "The Dominion Controverted Elections Act, 1874," is not *ultra vires* of the Dominion Parliament, and whether the Act established a Dominion Court or not, the Dominion Parliament had a perfect right to give to the Superior Courts of the respective provinces, and the judges thereof, the power, and impose upon them the duty, of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers and established courts to discharge the duties assigned to them by that Act, in any particular, invade the rights of the local legislatures.

2. That upon the abandonment by the House of Commons of the jurisdiction exercised over controverted elections without express legislation thereon, the power of dealing therewith would fall, *ipso facto*, within the jurisdiction of the Superior Courts of the provinces by virtue of the inherent original jurisdiction of such courts over civil rights.

3. That the Dominion Parliament has the right to interfere with civil rights, when necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

Election—Continued.

4. *Per Ritchie, C.J., and Taschereau and Gwynne, JJ.*—That "The Dominion Controverted Elections Act, 1874," established, as the Act of 1873 did, as respects elections, a Dominion Court.

Montmorency Election Case, Valin v. Langlois.—iii. 1.

[The Judicial Committee of the Privy Council refused leave to appeal in this case. On the general question as to the class of cases in which the Judicial Committee would grant leave to appeal, Lord Selborne expressed himself as follows :

"It has been rendered necessary, by the legislation which has taken place in the colony to make a special application to the Crown in such a case for leave to appeal; and their lordships have decided on a former occasion that a special application of that kind should not be lightly or very easily granted; that it is necessary to show both that this matter is one of importance and also that there is really a substantial question to be determined." 5 App. Cases, 117.]

5. *The Dominion Controverted Elections Act, 1874, s. 8, s-s. 2—*
Cross petition—Delay for presenting.

V. (the appellant), the sitting member, against whom an election petition had been filed by L. (the respondent), an unsuccessful candidate, presented a cross-petition under s. 8, s-s. 2, of the Dominion Controverted Elections Act, 1874, alleging that L. was guilty, as well by himself as by his agent, with his knowledge and consent, of corrupt practices at the said election. This cross-petition was not filed within thirty days after the publication in the *Canada Gazette* of the return to the writ of election by the clerk of the Crown in Chancery, but within the delay mentioned in the last part of said s-s. 2, s. 8, viz. : fifteen days after the service of the petition upon V., complaining of his election and return. The cross-petition was met by a preliminary objection, maintained by Meredith, C.J., alleging that it was filed too late.

Held, on appeal, that the sitting member cannot file a cross-petition, within the delay of fifteen days mentioned in the last part of said s-s. 2 of s. 8, against a person who was a candidate and is a petitioner.

Per Fournier, Taschereau and Gwynne, JJ.—The said extra delay of fifteen days is given only when a petition has been filed against the sitting member, alleging corrupt practices after the return. (Henry, J., dissenting.)

Montmorency Election Case, Valin v. Langlois.—iii. 90.

6. *Controverted Elections Act, 1874—Gifts and subscriptions for*
charitable purposes—Payment of a just debt without refer-
ence to election, not bribery.

Held, 1. That if gifts and subscriptions for charitable purposes made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to, or on any condition that, any body of men, or any individual, should vote or act in any way at an election, or on any express or implied promise or undertaking that

Election—Continued.

such body of men, or individual, would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice, within the meaning of that expression as defined by the Election and Controverted Elections Acts, 1874.

2. That the settlement by payment of a just debt by a candidate to an elector without any reference to the election, is not a corrupt act of bribery, and especially so when the candidate distinctly swears he never asked the elector's support, and the elector says he never promised it and never gave it. *Taschereau and Gwynne, JJ.*, doubting whether the transactions proved were not within the prohibitory provisions of the Act.

South Ontario Election Case, McKay v. Glen.—iii. 641.

7. *Election appeal, notice of setting down for hearing—Power of judge who tried the petition to grant an extension of time for giving such notice—S. & E. C. A. s. 48—Supreme Court Rules, 56, 69.*

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the Registrar of the court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Court Act.

Held, that this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal; that the appellant having failed to comply with the statute, the court could not grant relief under Rules 56 or 69; and that therefore the appeal could not be then heard, but must be struck off the list of appeals, with costs of the motion.

Subsequent to this judgment, the appellant applied to the judge who tried the petition, to extend the time for giving the notice, whereupon the said judge granted the application and made an order, "extending the time for giving the prescribed notice till the 10th day of December then next." The case was again set down by the Registrar for hearing by the Supreme Court at the February session following, being the nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session, and that the judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case for hearing by the Registrar of this court.

Held, that the power of the judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the judge having

Election—Continued.

made such an order in this case, the appeal came properly before the court for hearing. Taschereau, J., dissenting.

North Ontario Election Case, Wheeler v. Gibbs.—iii. 374.

8. *The Dominion Elections Act, 1874, ss. 96 & 98—Hiring a team to bring voter to poll a corrupt practice—"Wilful" offence—Advance of money when not made in order to induce voter to procure the return of the candidate not bribery.*

As to the case of one J. F. G., the charge was that the respondent bribed him by the payment of a promissory note for \$89. The evidence showed J. F. G. had been canvassing for respondent a long time before the note fell due, and had always supported him. He was on his way to retire his note, which was overdue, or falling due that day, when respondent asked him to canvass that day, and promised to send him into town and have the note arranged for him. At the same time J. F. G. was negotiating for a loan on a mortgage to respondent, and it was at first stipulated that the amount of this note should be taken out of the mortgage money. The agent of the respondent, after the election, at the request of J. F. G., paid the mortgage money in full and allowed the matter of the note to stand until J. F. G. could see respondent. J. F. G. stated that neither the note nor the mortgage transaction influenced him in any way, and that he had to pay the note and did not expect respondent to make him a present of it.

Held, that the evidence did not show that the advance of money was made in order to induce J. F. G. to procure, or to endeavour to procure, the return of the respondent, and was not, therefore, bribery within the meaning of s-s. 3 of s. 62 of the Dominion Elections Act, 1874.

As to the case of one M., the evidence showed that M.'s team was hired some days before the opening of the poll by C., an agent of the respondent, for the purpose of bringing two voters to the polls. M. went for the voters, returned the day previous to the voting day without the voters and was paid fifteen dollars.

Held, that the term "six preceding sections" in the 98th section of "The Dominion Elections Act, 1874," means the six sections immediately preceding the 98th, and, therefore, the hiring of a team to convey voters to the polls, prohibited by the 96th section, was a corrupt practice within the meaning of the 98th section. (Henry, J., dissenting).

Selkirk Election Case, Young v. Smith.—iv. 494.

9. *Bribery—promise to pay legal expenses of a voter, who is a professional public speaker—The Dominion Elections Act, 1874, s-s. 3, s. 92.*

Appeal from a judgment of Armour, J., holding that appellant had employed and promised to pay the expenses of one H., a voter, who was a lawyer and a professional public speaker, and, therefore, was guilty of bribery

Election—Continued.

within the meaning of s-s. 3 of s. 92 of The Dominion Elections Act of 1874. The evidence as to agreement entered into between H. and appellant was contradictory. It was admitted, however, that H. addressed the meetings in the interest of the appellant, and during the time of the election made no demand for expenses, except on one occasion, when attending a meeting and finding himself without money he asked for and received the sum of \$1.50 for the purpose of paying the livery bill of his horse.

Held, that the weight of evidence showed that the appellant only promised to pay H.'s travelling expenses, if it were legal to do so, and such promise was not a breach of s-s. 3 of s. 92 of The Dominion Elections Act, 1874. Taschereau and Gwynne, JJ., dissenting.

Per Fournier, J.—Candidates may legally employ and pay for the expenses and services of canvassers and speakers, provided the agreement be not a colourable one intended to evade the bribery clauses of the Act.

Per Taschereau and Gwynne, JJ.—Such a payment would be illegal.

North Ontario Election Case, Wheeler v. Gibbs.—iv. 430.

10. *Election petition—Supreme Court Act, s 44—Right to send back record for further adjudication—Bribery—Appeals from findings upon matters of fact—Insufficiency of return of election expenses—Personal expenses of candidates to be included.*

The original petition came before Mr. Justice McCord for trial, and was tried by him on the merits, subject to an objection to his jurisdiction. The learned judge, having taken the case *en délibéré*, arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained, and the petition of the petitioner was rejected and dismissed." This judgment was appealed from, and the now respondent under section 48 of the Supreme Court Act, limited his appeal to the question of jurisdiction, and the Supreme Court held that Mr. Justice McCord had jurisdiction, and it was ordered that the record be transmitted to the proper officer of the lower court to have the said cause proceeded with according to law. The record was accordingly sent to the prothonotary of the Superior Court at Montmagny. Mr. Justice McCord, after having offered the counsel of each of the parties a re-hearing of the case, proceeded to render his judgment on the merits and declared the election void. The respondent then appealed to the Supreme Court, and contended that Mr. Justice McCord had no jurisdiction to proceed with the case.

Held, that the Supreme Court, on the first appeal, could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court below to be proceeded with according to law, gave jurisdiction to Mr. Justice McCord to proceed with the case on the merits, and to pronounce a judgment on such merits, which latter judgment

Election—Continued.

was properly appealable under section 48, Supreme Court Act. (Fournier and Henry, JJ., dissenting).

The charge upon which this appeal was principally decided was that of the respondent's bribery of one David Asselin. The learned judge who tried the case found, as a matter of fact, that the appellant had underhandedly slipped into Asselin's pocket \$5 for a pretended purpose, that was not even mentioned to the recipient; that this amount was not included in the published return of his expenses as required by the Election Act, and this payment was bribery.

Held, that an Appellate Court in election cases ought not to reverse, on mere matters of fact, the findings of the judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below, that appellant had been guilty of personal bribery.

Per Taschereau, J.—The personal expenses of the candidates should be included in the statement of election expenses required to be furnished to the returning officer under 37 V. c. 9, s. 128. (Fournier and Henry, JJ., expressed no opinion on the merits. The judgment of McCord, J., on the other charges was also affirmed.)

Bellechase Election Case, Larue v. Deslauriers.—v. 91.

11. *The Dominion Elections Act, 1874, ss. 82, 83, & 84—Public peace—Colourable employment—Liability of candidate for the acts of persons employed by agent—Bribery.*

On a charge of bribery against one T. and one A., upon which this appeal was decided, the judge who tried the petition found as a fact that A. had been directed by T., an admitted agent of the respondent, to employ a number of persons to act as policemen at one of the polling places in the parish of Bay St. Paul, on the polling day, and had bribed four voters previously known to be supporters of the appellant by giving them \$2 each, but held that A. was not agent of the respondent, and therefore his acts could not void the election.

Held, on appeal, that as there was no excuse or justification for employing these voters, their employment was merely colourable, and these voters having changed their votes in consequence of the moneys so paid to them, and the sitting member being responsible alike for the acts of A., the sub-agent, as for the acts of T., the agent, and they having been guilty of corrupt practices, the election was void. Taschereau and Gwynne, JJ., holding that A., the sub-agent alone, had been guilty of bribery.

Charlevoix Election Case, Cimon v. Perrault.—v. 138.

12. *Ballots—Scrutiny—37 V. c. 9, ss. 43, 45, 55 & 80—41 V. c. 6, ss. 5, 6 & 10—Effect of neglect of duty by a deputy-returning officer—37 V. c. 10, ss. 64 & 66—Recriminatory case.*

In ballot papers containing the names of four candidates, the following ballots were held valid: 1. Ballots containing two crosses, one on the line

Election—Continued.

above the first name, and one on the line above the second name, valid for the two first named candidates; 2. Ballots containing two crosses, one on the line above the first name and one on the line dividing the second and third compartments, valid for the first named candidate; 3. Ballots containing properly made crosses in two of the compartments of the ballot paper, with a slight lead pencil stroke in another compartment; 4. Ballots marked in the proper compartments thus \times . The following ballots were held invalid: 1. Ballots with a cross in the right place on the back of the ballot paper, instead of on the printed side; 2. Ballots marked with an x instead of a cross.

On a recount before the County Court Judge, J., the appellant, who had a minority of votes according to the return of the returning officer, was declared elected, all the ballots cast at three polling districts, in which the appellant had polled only 381 votes and the respondent, B., 345, having been struck out on the ground that the deputy returning officer had neglected to place his initials upon the back of the ballot.

On appeal to the Supreme Court of Prince Edward Island, it was proved that the deputy-returning officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballot in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Mr. Justice Peters held that the ballots of the said three polls ought to be counted, and did count them.

Thereupon J. appealed to the Supreme Court of Canada, and it was **Held**, affirming the judgment of Mr. Justice Peters, that in the present case, the deputy-returning officer having had the means of identifying the ballot papers as being those supplied by him to the voters; and the neglect of the deputy-returning officers to put their initials on the back of these ballot papers not having affected the result of the election, or caused substantial injustice, did not invalidate the election. (The decision in the Monk election case [Hodgins' election cases, 725] commented on and approved of.)

In this case, J., the appellant, claimed under s. 66 of 37 V. c. 10, that if he was not entitled to the seat the election should be declared void, on the ground of irregularities in the conduct of the election generally, but filed no counter petition and did not otherwise comply with the provisions of 37 V. c. 10, The Dominion Controverted Elections Act.

Held, that s. 66 of 37 V. c. 10 only applies to cases of recriminatory charges, and not to a case where neither of the parties or their agents are charged with doing a wrongful act.

Quare: Whether the County Judge can object to the validity of a ballot paper when no objection has been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of s. 56, 37 V. c. 10, at the time of the counting of the votes by the deputy-returning officer.

Queen's County P. E. I. Election Case, Jenkins v. Brecken.—vii. 247.

Election—Continued**13. Rule rescinding *ex parte* order extending time for service of petition—S. C. A. A., 1879, s. 10.**

The petitioner, on an *ex parte* application to a judge of the Supreme Court of N.S., obtained an extension of time for service of the petition, but subsequently, on application of respondent, on cause shown, the judge rescinded the order as made improvidently. On a second application made *ex parte* by petitioner, supported by affidavits, the judge made another order extending the time. The respondent then obtained from the judge a rule *nisi* to set aside this second order, and such rule was made absolute by the full court, on the ground that all the facts on which the second application was based were in the knowledge of the petitioner when the first application was made.

Held, Fournier and Henry, JJ., dissenting, that the rule of the Supreme Court of N. S. was not a judgment, rule, order or decision on a preliminary objection from which an appeal would lie under s. 10, S. C. A. A., 1879.

Kings County, N.S. Election Case, (Dickie v. Woodworth)—viii. 192.

[This case was approved of and followed in the Gloucester, N.B., election case. See Election, 14.]

14. Appeal on election petition—42 V. c. 39 (The Supreme and Exchequer Court Amendment Act of 1879) s. 10, construction of—Rule absolute by court in banc to rescind order of a judge in chambers—Preliminary objection.

A petition was duly filed and presented by appellant on the 5th of August, 1883, under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections were filed by respondent, and before the same came on for hearing the attorney and agent of respondent obtained, on the 13th October, from Mr. Justice Weldon, an order authorizing the withdrawal of the deposit money and removal of the petition off the files. The money was withdrawn, but shortly afterwards, in January, 1883, the appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained, upon summons, a second order from Mr. Justice Weldon rescinding his prior order of 13th October, 1882, and directing that, upon the appellant repaying to the clerk of the court the amount of the security, the petition be restored, and that the appellant be at liberty to proceed. Against this order of January, 1883, the respondent appealed to the Supreme Court of New Brunswick, and the court gave judgment, rescinding it.

On appeal to the Supreme Court of Canada, Held, that the judgment appealed from is not a judgment on a preliminary objection within the meaning of 42 V. c. 39, s. 10 (The Supreme Court Amendment Act, 1879), and therefore not appealable.

Gloucester Election Case, Commeau v. Burns.—viii. 204.

Election—Continued.**15. Election petition—Preliminary objections—Onus probandi.**

The election petition in this case complained of the return of the respondent as member elect for the County of Megantic (P. Q.) for the House of Commons. The petition was met by preliminary objections, in which the sitting member alleged, *inter alia*, that the petitioners were not electors, nor qualified to vote at the election in question, etc. A day having been fixed for the hearing of these preliminary objections, no evidence was given upon them, and they were dismissed by Plamondon, J., who held, following the practice adopted by the Superior Court of Quebec, sitting as an election court in the *L'Islet* case *Duval v. Casgrain*, that the *onus probandi* was on the respondent to support such objections.

On appeal to the Supreme Court of Canada, Fournier, Henry and Gwynne, JJ., were of opinion that the *onus probandi* was on the appellant, who by his preliminary objections had affirmed the disqualification of the petitioner. *Contra*, Ritchie, C.J., and Strong and Taschereau, JJ. The court being equally divided, the judgment of the court below stood affirmed without costs. [See Election, 86 and 40]

Megantic Election Case, Freshette v. Goulet.—viii. 169.

16. Dominion controverted election—Ontario Judicature Act, 1881, effect of—Presentation of petition.

The election petition against the election and return of the respondent was entitled in the High Court of Justice, Queen's Bench division, and was presented to the official in charge of the office of the Queen's Bench division, and filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction.

Held, Henry and Taschereau, JJ., dissenting, reversing the judgment of Cameron, J., that the Ontario Judicature Act, 1881, makes the High Court of Justice and its divisions a continuation of the former courts merged in it, and that those courts still exist under new names; and that the petition had not been irregularly entitled and filed.

West Huron Election Case, Mitchell v. Cameron.—viii. 126.

17. Ballots—Scrutiny—Irregularities by deputy-returning officers—Numbering and initialing the ballot papers by deputy-returning officer, effect of—The Dominion Elections Act, 1874, s. 80—Corrupt practices—Recriminatory case.

In a polling division, No. 3, Dawn, there was no statement of votes either signed or unsigned in the ballot box, and the deputy-returning officer had endorsed on each ballot paper the number of the voter on the voter's list. These votes were not included either in the count before the returning officer or the re-summing up of the votes by the learned judge of the County Court, or in the re-count before the judge who tried the election petition.

Held, affirming the judgment of the court below, that the ballots were properly rejected.

Election—Continued.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper and a line drawn dividing the paper in the middle.

Held, affirming the ruling of the learned judge at the trial, that these ballots were valid.

Per Ritchie, C.J.—Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as, for instance, by making a straight line or round O, then such non-compliance with the law renders the ballot null. (*See The Stepney Case*—By Denman, J., 4 O. M. & H. 37.)

Division 1, *Sombra*—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy-returning officer, who had been putting his initials and the numbers on the counterfoil, not on the ballot papers, initialled and numbered about twelve of the ballot papers, but finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took these ballots out of the box and obliterated the marks he had put upon them.

Held, Gwynne and Henry, JJ., dissenting, that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy-returning officer to the voters, these ballots should be held good, and that said irregularities came within the saving provisions of s. 80 of the Dominion Elections Act, 1874.

Per Henry, J.—Although the ballots should be considered bad, the present appellant having acted upon the return and taken his seat, was not in a position to claim that the election was void.

Bothwell Election Case, Hawkins v. Smith.—viii. 676.

18. *Railway pass*—37 V. c. 9, ss. 92, 96, 98 & 100—*Questions of fact in appeal—Agent, limited powers of.*

In appeal, four charges of bribery were relied upon, three of which were dismissed in the court below, because there was not sufficient evidence that the electors had been bribed by an agent of the candidate; and the fourth charge was known as the Lamarche case. The facts were as follows:—One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railroad, to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election.

Election—Continued.

the voters having accepted the tickets without any promise being exacted from or given by them. The tickets showed on their face that they had been paid for, but there was evidence L. had received them gratuitously from one of the officers of the company. The learned judge who tried the case found as a fact that the tickets had not been paid for, and were given unconditionally, and therefore held it was not a corrupt act.

Held,—1. Fournier and Henry, JJ., dissenting, that the taking unconditionally and gratuitously of a voter to the poll by a railway company, or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 87 V. c. 9 (D.).

2. That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under s. 96, and by virtue of s. 98 a corrupt practice, and would avoid the election.

3. That an agent who is not a general agent, but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority.

As to the remaining three charges, the court was of opinion that on the facts the judgment of the court below was not clearly wrong and should therefore not be reversed.

Berthier Election Case, Genereux v. Cuthbert.—ix. 102.

19. Appeal on matters of fact—Bribery—Corrupt intent.

Among other charges of bribery and treating which were decided on this appeal was the following:—One Mireau, a blacksmith, who was a neighbour of the respondent, had in his possession for two years several pieces of broken saws which the respondent had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination the respondent went into Mireau's shop with a scraper he wanted to be sharpened, and in return for sharpening the scraper told him to keep the old pieces of saw which he might still have. Mireau in his evidence answered as follows: Q. He did not speak of your vote? A. No. Q. What has he said? A. He said that Mr. Magnan was coming like mustard after dinner? Q. M. Dugas did not ask you for whom you were? A. No. * * * Q. Do you swear on the oath that you have taken that M. Dugas left with you these two pieces of saws in question with the intent to buy (*bribe*) you? A. I think so, I cannot say that it is sure, I don't know his mind (*son idée*). It is all I can swear. Q. It has not changed your opinion? A. No. Q. For whom were you in the last election? A. For M. Magnan." The scrapers were worth in all about two dollars, and were of no use to the respondent, and no other conversation took place afterwards between the parties. The judge who tried the case found that there was no intention on the part of the respondent to corrupt Mireau.

Held, that the Supreme Court on appeal will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the

Election—Continued.

matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing Mireau, as well as of the other charges of bribery and treating, was not such as would justify an Appellate Court in drawing the inference that the respondent intended to corrupt the voters.

Montcalm Election Case, Magnan v. Dugas.—ix. 93.

20. Status of petitioner, how proved—Gift not a charity or liberality—Bribery—Shorthand writer's notes.

At the trial of the petition the returning officer, who was also the registrar of the county of Megantic, and secretary of the municipality of Inverness, was called as a witness, and produced in court, in his official capacity, the original list of electors for the township of Inverness, and proved that the name L. McM., one of the petitioners, whom he personally knew, was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way.

Held, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 87 V. c. 10, s. 7 (D.)

The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him.

Held, that the notes of evidence could not be objected to.

Before setting out on a canvassing tour the appellant, the sitting member placed in the hands of one B., who was not his financial agent, \$100 to be used for the purpose of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality, who indicated to B. his dissatisfaction with the candidate of his party, and stated that, although he would vote for the liberal party, he would not exert himself as much as in the former elections. The appellant then went outside, and B. asked his host, "Do you want any money for your church?" And, having received a negative reply, added, "Do you want any money for anything?" K. then answered, "If you have any money to spare there are plenty of things we want it for. We are building a town hall and we are scarce of money." B. then said, "Will \$25 do?" K. answered, "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant and B. good-bye, K. said, "Gentlemen, remember that this money has no influence as far as I am concerned with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of \$25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent of the appellant.

Election—Continued.

Held, affirming the judgment of the court below, that the giving of the \$25 by B. to K. was not an act of liberality or charity, but a gift out of appellant's money, with a view to influence a voter favourably to the appellant's candidature, and that, although the money was not given in the appellant's presence, yet it was given with his knowledge, and therefore that the appellant had been personally guilty of a corrupt practice.

Megantic Election Case, Frechette v. Goulet.—ix. 279.

21. *The Dominion Elections Act, 1874—Wager by agent with voter—Bribery—Corrupt practice—Treating on polling day—Agency.*

One Pringle, an acknowledged agent of the respondent and the President of the Conservative Association, whose candidate the respondent was, made a bet of \$5 with one Parker, a Liberal, that he would vote against the Conservative party, and deposited with a stakeholder the \$5, which, after the election, was paid over to Parker. At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and alleged that the bet was made as a sporting bet on the spur of the moment, and with the expectation that, as he said, Parker, would warm up and vote; but he also admitted in evidence that it passed through his mind that some one on the voter's side would make the money good if he voted. Parker said he had formed the resolution not to vote before he made his bet, but the evidence showed that he did not think lightly of the sum which he was to receive for his not voting, his answer to one question put to him being: "Oh! I don't know that \$5 would be an insult to any one not to vote."

Held, reversing the judgment of the court below, that the bet in question was colorable bribery within the enactments of s-s. 1 of s. 92 of the Dominion Elections Act, 1874, and a corrupt practice which avoided the election.

The acts complained of in the *Heenan-Beauvais* charge were also relied on as sufficient to have the election set aside. The facts of this charge were that H., a Conservative, prior to the election, canvassed, in company with the respondent, one B. On election day H. was selected by the assistant secretary of the association (an acknowledged agent of the respondent) to represent the respondent at the Burnley poll, and obtained from him a certificate under s. 42 of the Dominion Elections Act, entitling him to vote at the Burnley poll. H. there met B. and treated him by giving him a glass of whiskey, and after B. had voted he gave him \$2, and subsequently sent him \$50. The treating, according to B.'s evidence, was nothing more than an act of good fellowship; and according to H.'s account, B. was not feeling well, and the whiskey was given in consequence. B. negatived that the \$2 were paid him for his vote, and H. said that he supposed it was a dollar bill and told B. to go and treat the boys with it, and that it was not given on account of any previous promise, or for his having voted. The court below held that none of these acts constituted corrupt acts so as to avoid the election.

On appeal to the Supreme Court of Canada, Held, *per* Ritchie, C.J., and Henry and Taschereau, JJ.—There was sufficient evidence of H.'s agency, but it was not necessary to decide this point.

Election—Continued.

Per Strong, J.—There was no proof of H.'s agency. Agency is not to be presumed from the fact that the respondent permitted H. to canvass B. in his presence, and there is an entire absence of proof of any sufficient authority to H. to bind the respondent by his acts at the polling place in the matters of treating and the payment of the \$2.

Per Fournier, J.—The treating of B. on polling day, both before and after he had voted, by H., an agent, and the giving of the sum of \$2 immediately after he had voted, were corrupt acts sufficient to avoid the election.

West Northumberland Election Case, Henderson v. Gullet.—x. 635.

22. *Dominion Elections Act, 1874, s. 95—Intimidation—Undue influence—Conspiracy between deputy-returning officer and respondent's agent to interfere with franchise by marking ballots—Effect of—Election void.*

In an election petition it was charged that the respondent personally, as well as acting by C. A. C., P. D. and others, his agents, did undertake and conspire to impede, prevent, and otherwise interfere with the free exercise of the franchise by certain voters, and that, in furtherance of a premeditated scheme which the respondent and his agents well knew to be illegal, they did, in fact, so impede, prevent, and interfere with the exercise of the franchise of certain voters, by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters was unjustifiably interfered with.

At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested was set aside, and certain voters were reported by the judge as having been guilty of corrupt practices, under s. 104 of the Dominion Elections Act.

At a public meeting before the election C. A. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters.

On the polling day D. P., who had been appointed deputy-returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with C. A. C., and on his advice and in collusion with him marked the ballots of certain of these voters.

Held, that the election was void by reason of the attempted intimidation practiced by C. A. C., the respondent's agent; and by reason also of the conspiracy between the said agent and the deputy-returning officer to interfere with the free exercise of the franchise of voters, violations of s. 95 of The Dominion Elections Act, 1874, and corrupt practices under s. 98 of the said Act.

Soulanges Election Case, Cholette v. Bain.—x. 652.

Election—Continued.**23. Dominion Elections Act, 1874, ss. 96 & 98—Promise to pay debts due for a previous election—Hiring of carters to convey voters to poll—Corrupt practices.**

Held, affirming the judgment of the court below,

1. When an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to.

2. The payment by an agent of a sum of \$147 to a voter claiming the same to be due for expenses at a previous election, and who refuses to vote until the amount is paid, is a corrupt practice.

3. The hiring and paying of carters by an agent to convey voters who are known to be supporters of the agent's candidate is a corrupt practice: *Selkirk Election Case, Young v. Smith*, 4 Can. S. C. R. 494 followed.

Lewis Election Case, Belleau v. Dussault.—xi. 133.

24. Election petition—Service of copy—Extension of time—Discretion of judge—R. S. C. c. 9, s. 10.

An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that the respondent was at Ottawa, is a proper order for the judge to make in the exercise of his discretion under section 10 of chapter 9, R. S. C.

Semble, *per* Ritchie, C.J., and Henry, J., that the court below had power to make rules for the service of an election petition out of the jurisdiction.

Per Strong, J.—An extremely strong case should be shewn to induce the court to allow an appeal from the judgment of the court below on preliminary objections.

Shelburne Election Case, Robertson v. Laurie.—xiv. 258.

25. Legislative assembly—Disqualification—Enjoying and holding an interest under a contract with the Crown—What constitutes—30 V. c. 3, ss. 4 & 8, (P.E.I.)

By commission or instrument under the hand and seal of the Lieutenant-Governor of P. E. I., one E. C. was constituted and appointed ferryman at and for a certain ferry for the term of three years, pursuant to the Acts relating to ferries, and it was by the commission provided that E. C. should be paid a subsidy of \$95 for each year of said term. E. C. had given to the government a bond with two sureties for the performance of his contract. By articles of agreement between E. C. and S. F. P. (the respondent) E. C. for valuable consideration assigned to S. F. P. one-fourth part or interest in the ferry contract, and it was agreed that one-fourth part of the net proceeds or profits of said contract should be paid over by the said E. C. to the said S. F. P. or his assigns. At the time the agreement was entered into S. F. P. was a member of the House of Assembly of P. E. I. having been elected at the

Election—Continued.

general election held on the 30th June, 1886. Subsequently S. F. P. was returned as a member elect for the House of Commons for the electoral district of Prince County, P. E. I., and upon his return being contested,

Held, affirming the judgment of the court below, Taschereau, J., dissenting, that, by the agreement with E. C., F. S. P. became a person holding and enjoying, within the meaning of section 4 of 39 V. c. 3, P. E. I., a contract or agreement with Her Majesty, which disqualified him and rendered him ineligible for election to the House of Assembly or to sit or vote in the same, and by section 8, of the said Act, to be read with section 4, his seat in the Assembly became vacated; and he was therefore eligible for election as a member of the House of Commons.

Prince County (P. E. I.) Election Case, Hackett v. Perry.—xiv. 265.

26. *Dominion Controverted Elections Act—R. S. C. c. 9, ss. 32, 33 & 50—Petition—Time, extension of—Appeal—Jurisdiction.*

An order in a controverted election case made by the court below or a judge thereof not sitting at the time for the trial of the petition, and granting or rejecting an application to dismiss the petition on the ground that the trial, had not been commenced within six months from the time of its presentation, is not an order from which an appeal will lie to the Supreme Court of Canada under section 50 of the Dominion Controverted Elections Act, R. S. C. c. 9, Fournier and Henry, JJ., dissenting.

L'Assomption Election Case, Gauthier v. Normandeau—Quebec County Election Case, O'Brien v. Caron.—xiv. 429.

27. *Election petition—Ruling by judge at trial—Appeal—Dominion Controverted Elections Act, R. S. C. c. 9, ss. 32, 33 & 50—Construction of—Time—Extension of—Jurisdiction.*

Held, 1st. That the decision of a judge at the trial of an election petition overruling an objection taken by the respondent to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition is appealable to the Supreme Court of Canada under s. 50 (b), c. 9, R. S. C. Gwynne, J., dissenting.

2nd. In computing the time within which the trial of an election petition shall be commenced the time of a session of parliament shall not be excluded unless the court or judge has ordered that the respondent's presence at the trial is necessary. Gwynne, J., dissenting.

3rd. The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition, unless an order had been obtained on application made within said six months; an order granted on an application made after expiration of

Election—Continued.

the said six months is an invalid order and can give no jurisdiction to try the merits of the petition, which is then out of court. Ritchie, C.J., and Gwynne, J., dissenting.

Glengarry Election Case, Purcell v. Kennedy.—xiv. 453.

[Application was made to the Judicial Committee for leave to appeal in this case, but the Judicial Committee refused to entertain the appeal. *See* 59 L. J. 279; 4 Times L. R. 664].

28. *Service of election petition—Defective—R. S. C. c. 9, s. 11—Art. 57, C. C. P.—Preliminary objections.*

The service of an election petition made in the province of Quebec, at the defendant's law office, situated on the ground floor of his residence and having a separate entrance, by delivering a copy thereof to the defendant's law partner who was not a member of, nor resident with, the defendant's family, is not a service within s. 11, c. 9, R. S. C., and Art. 57, C. C. P., and a preliminary objection setting up such defective service was maintained and the election petition dismissed. Gwynne, J., dissenting.

Montmagny Election Case, Choquette v. Laberge.—xv. 1.

29. *Commencement of trial—Order of judge staying proceedings during the session of Parliament—Power to adjourn—Recriminatory charges—R. S. C. c. 9, s. 31, s-s. 4, ss. 32, 33, s-s. 2, and ss. 35 & 42—Bribery by agent.*

After the trial of an election petition has been commenced, the trial judge may adjourn the case from time to time, as to him seems convenient.

Where the proceedings for the commencement of the trial have been stayed during a session of parliament by an order of a judge, and a day has been fixed for the trial within the statutory period of six months as so extended, on which day the petitioners proceeded with their *enquête* and examined two witnesses after which the hearing was adjourned to a day beyond the statutory period as so extended to allow the petitioners to file another bill of particulars, those already filed having been declared insufficient.

Held, there was sufficient commencement of the trial within the proper time and the future proceedings were valid under section 32 of The Controverted Elections Act, R. S. C. c. 9.

In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against the defeated candidate and the trial judge, after having found that the election of the sitting member should be set aside for corrupt practices, fixed a day for the evidence upon the recriminatory charges. Thereupon the petitioners withdrew the claim to the seat, and the judge gave judgment avoiding the election.

Held, that section 42 of chapter 9, R. S. C., no longer applied, and the judge was right in refusing to proceed upon the recriminatory charges.

Election—Continued.

Per Gwynne, J., that it would have been competent for the trial judge to have received evidence on the recriminatory charges, but his refusal to do so was not a sufficient ground for reversing the judgment avoiding the election.

Joliette Election Case, Gullbault v. Dessert.—xv. 458.

30. Scrutineer, agency of—Wilfully inducing a voter to take false oath—Corrupt practice—Qualification of voters—Farmers' sons—Oath T—R. S. C. c. 8, ss. 90 & 91, and ss. 41 & 45—Ballot papers rejected—Finding of trial judge.

A scrutineer appointed for a polling place at an election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable.

The insisting by such scrutineer of the taking of the farmer's son's oath T by a hesitating voter whose vote is objected to and who is registered on the list as a farmer's son and not as owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list leaving the son owner of the property, is a wilful inducing or endeavouring to induce the voter to take a false oath, so as to amount to a corrupt practice within ss. 90 & 91 of c. 8 R. S. C., and such corrupt practice will avoid the election under s. 93. Strong and Gwynne, JJ., dissenting.

Per Strong, J.: That reading section 41 in conjunction with section 45, s-s. 2, and the oath T in schedule A of c. 8, R. S. C.; an enquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shown that a larger number of unqualified farmer's sons votes than the majority were admitted the election will be void. (Taschereau, J., *contra*.)

2. Secrecy of the ballot is an absolute rule of public policy, and it cannot be waived. S. 71, c. 9, R. S. C.

On this appeal, certain ballot papers being objected to.

Held, that it will require a clear case to reverse the decision of the trial judge who has found as a question of fact whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter.

Also, that where the x is not unmistakably above or below the line separating the names of the candidates the ballot is bad.

Haldimand Election Case, Walsh v. Montague.—xv. 495.

31. Bribery by agent—Proof of agency—Proof by conduct.

An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered and paid \$5 to induce a voter to refrain from voting. The evidence showed that H. was in the habit of assisting this particular voter, and that being told by the voter that he contemplated going away from home on a visit a few days before the election, and being away on election day, H. promised him \$5 towards paying his expenses. Shortly after

Election—Continued.

the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him \$5. He went away and was absent on election day.

Held, that the offer and payment of the \$5 formed one transaction and constituted a corrupt practice under the Election Act.

At the election in question there was no formal organization of the party supporting the appellant. The county reform association had been disbanded and the minutes, regularly kept since 1882, destroyed, as were the rough minutes of every meeting of a convention of the party held since that date. In lieu of local committees vice-presidents were appointed for the respective townships, and on the approach of a contest the vice-presidents called a meeting of the county association, composed of all reformers in the riding, to go over the lists and do all the necessary work of the election. The evidence of H.'s agency relied on by the petitioner was, that he had always been a reformer, had been active for two elections, had attended one important committee meeting and been recognized by the vice-president of his township as an active supporter of the appellant, and that he acted as scrutineer at the polls in the election in question. The trial judge held that all these elements combined, in view of the state of affairs regarding organization, were sufficient to constitute H. an agent of the appellant. On appeal to the Supreme Court of Canada,

Held, Ritchie, C.J., dissenting, and Taschereau, J., hesitating, that the circumstances proved justified the trial judge in holding the agency of H. established.

Haldimand Election Case, Colter v. Glenn.—xvii. 170.

32. Provincial election—Fund for—Contract relating to—Promissory note—38 V. c. 7, s. 266 (Q.)—R. S. Q. Art. 425.

In an action on a promissory note the evidence showed that its proceeds were given to an election agent to be used as a portion of an election fund controlled by the maker.

Held, that the transaction was illegal under 38 V. c. 7, s. 266 (Q.) (now R. S. Q., Art. 425) which makes void any contract, promise or understanding in any way relating to an election under that Act, and the plaintiff could not recover.

Dansereau v. St. Louis.—xviii. 587.

33. Election petition—Preliminary objections—Service at domicile—R. S. C. c. 9, s. 10.

Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household during the five days after the presentation of the same is a sufficient service under section 10 of the Dominion Controverted Elections Act even though the papers served do not come into the possession or within the knowledge of the respondent. (See now 54-55 V. c. 20, s. 8.)

King's (N. S.) Election Case, Borden v. Berteaux.—xix. 526.

Election—Continued.**34. Election petition—Appeal—Dissolution of Parliament—Return of deposit.**

In the interval between the taking of an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sittings (1891) of the Supreme Court of Canada, parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent, subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs, moved before a judge of the Supreme Court in chambers (the full court having referred the motion to a judge in chambers) to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below. The petitioner asserted his right to have his deposit returned to him.

Held, *per* Patterson, J., that the final determination of the right to costs being kept in suspense by the appeal the motion should be refused.

Held, also, that inasmuch as the money deposited in the court below ought to be disposed of by an order of that court, the registrar of this court should certify to the court below that the appeal was not heard, and that the petition dropped by reason of the dissolution of Parliament on the 2nd February, 1891.

Halton Election Case, Lush v. Waldie.—xix. 557.

[In this case the court below, having refused to pay out the money deposited to the petitioner on his application, he moved before the Supreme Court and obtained from that court, upon its being shown that the order made by Mr. Justice Patterson had not been appealed from, a declaration that he was entitled to the repayment to him of the money deposited, both as security for costs of petition and as security for costs of appeal.—15th March, '93.]

35. Election petition—Preliminary objections—R. S. C. c. 9, s. 63—English general rules—Copy of petition—R. S. C. c. 9, s. 9 (h)—Description and occupation of petitioner.

Held, affirming the judgment of the court below, that the judges of the court in Manitoba not having made rules for the practice and procedure in controverted elections the English rules of Michaelmas Term, 1868, were in force (R. S. C. c. 9, s. 63), and that under rule 1 of the said English rules the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the court to be sent to the returning officer, and that his failure to do so is the subject of a substantial preliminary objection and fatal to the petition. Strong and Gwynne, JJ., dissenting.

Held further, reversing the judgment of the court below, that the omission to set out in the petition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and is therefore not fatal.

Lisgar Election Case, Collins v. Ross.—xx. 1.

Election—Continued.**36. Election appeal—Preliminary objections—Status of petitioner—Onus Probandi—Court equally divided—Effect of.**

By preliminary objections to an election petition the respondent claimed the petition should be dismissed because the said petitioner had no right to vote at said election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed.

Held, per Sir W. J. Ritchie, C.J., and Taschereau and Patterson, JJ., that the *onus probandi* was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence the appeal should be allowed without costs.

Fournier and Gwynne, JJ., *contra*, were of opinion that the *onus probandi* was on the respondent. *The Megantic Election Case* (8 Can. S. C. R. 169) discussed.

When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the actual parties to the litigation only and the court, when a similar case is brought before it, is not bound by the result of the previous case.

[See *infra*, 40.]

Stanstead Election Case, Rider v. Snow.—xx. 12.

37. Election petition—Preliminary objections—Personal service at Ottawa—Security—Receipt—R. S. C. c. 9, ss. 8 & 9, s-s. (e) & (g) and s. 10.

In Prince Edward Island two members are returned for the electoral district of Queen's County. With an election petition against the return of the two sitting members the petitioner deposited the sum of \$2,000 with the deputy prothonotary of the court, and in the notice of presentation of petition and deposit of security he stated that he had given security to the amount of one thousand dollars for each respondent, "in all, two thousand dollars," duly deposited with the prothonotary, as required by statute. The receipt was signed by W. A. Weeks, the deputy prothonotary appointed by the judges, and acknowledged the receipt of \$2,000, without stating that \$1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa.

Held, 1st. That personal service of an election petition at Ottawa without an order of the court is good service under section 10 of The Controverted Elections Act.

2nd. That there being at the time of the presentation of the petition security to the amount of \$1,000 for the costs for each respondent the security given was sufficient. S. 8 & s. 9, s-s. (e) c. 9, R. S. C.

Election—Continued.

8rd. That the payment of the money to the deputy prothonotary of the court at Charlottetown was a valid payment. S. 9, s-s. (g) c. 9, R. S. C.

Queen's County, Davies v. Hennessey, and Prince County, Perry v. Cameron (P.E.I.) Election Cases. —xx. 26.

38. Election petition—Re-service of—Order granting extension of time—Preliminary objections—R. S. C. c. 9, s. 10—Description of petitioner.

On the 15th of April, 1891, the petitioner omitted to serve on the appellant with the election petition in this case a copy of the deposit receipt, but on the 20th April applied to a judge to extend the time for service that he might cure the omission. An order extending the time, subsequently affirmed on appeal by the Court of Appeal for Ontario was made and the petition was re-served accordingly with all the other papers prescribed by the statute. Before the order extending the time had been drawn up the respondent had filed preliminary objections and by leave contained in the order he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction of the Court of Appeal, or a judge thereof, to extend the time for service of the petition beyond the five days prescribed by the Act.

Held, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service. R. S. C. c. 9, s. 10.

The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation, and it was shown by affidavit that there are two or three other persons of that name on the voters' list for that township.

Held, affirming the judgment of the court, below, that the petition should not be dismissed for the want of a more particular description of the petitioner.

Glengarry Election Case, McLennan v. Chisholm.—xx. 38.

39. Election petitions—Preliminary objections—Service of petitions—Security—R. S. C. c. 9, s. 10, and s. 9 (e) & (g).

Appeals from the decisions of the courts below dismissing preliminary objections to the election petitions presented against the appellants.

The questions raised on these appeals were: 1st. Whether a personal service on the respondent at Ottawa without or with an order of the court at Halifax, or at his domicile is a good service. 2nd. Whether the payment of the security required by R. S. C. c. 9, s. 9 (e), into the hands of a person who was discharging the duties of and acting for the prothonotary at Halifax, and a receipt signed by said person in the prothonotary's name, section 9 (g), were valid.

The Court, following the conclusion arrived at in the King's County (N. S.), 19 C. S. C. R. 526, and Queen's County (P. E. I.), Election Cases,

Election—Continued.

20 C. S. C. R. 26, held the service and payment of security valid and a substantial compliance with the requirements of the statute.

Appeals dismissed with costs.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Shelburne (N. S.), *White v. Greenwood*; Annapolis (N. S.), *Mills v. Ray*; Lunenburg (N. S.), *Kaulbach v. Eisenhauer*; Antigonish (N. S.), *Thompson v. McGillivray*; Pictou (N. S.), *Tupper v. McColl*; and Inverness (N. S.), *McDonald v. Cameron*. —xx. 169.

40. Election petition—Status of petitioner—Onus probandi.

The petition was served upon the appellant on the 12th of May, 1891, and on the 16th May the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners and the court dismissed the objections. On appeal to the Supreme Court.

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that the onus was on the petitioners to prove their status as voters. *The Stanstead Case*, 20 Can. S. C. R. 12, followed.

Bellechasse Election Case, Amyot v. Labrecque.—xx. 181.

41. Election petition—Preliminary examination of respondent—Order to postpone until after session—Effect of—Six months' limit—R. S. C. c. 9, ss. 14 & 32.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioners moved to have the respondent examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case it would not "be possible for him to appear, answer the interrogatories and attend to the case in which his presence was necessary before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election trial" and that it was not possible "for him to attend to the present case for which his presence is necessary before the closing of the session," and the court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition and the objection was maintained.

Held, reversing the judgment of the court below, that the order was in effect an enlargement of the time for the commencement of the trial until
CAS. DIG.—18

Election—Continued.

after the session of Parliament and, therefore, in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included. R. S. C. c. 9, s. 32.

Laprairie Election Case, Gibeault v. Pelletier.—xx. 185.

42. Election petition—Preliminary objections—Deposit of security
R. S. C. c. 9, s. 9 (f).

The preliminary objection in the case was that the security and deposit receipt were illegal, null and void, the written receipt signed by the prothonotary of the court being as follows:—"That the security required by law had been given on behalf of the petitioners by a sum of \$1,000 in a Dominion note, to wit, a bank note of \$1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was in fact a Dominion note of \$1,000.

Held, affirming the judgment of the court below, that the deposit and receipt complied sufficiently with section 9 (f) of the Dominion Controverted Elections Act.

Argenteuil Election Case, Christie v. Morrison.—xx. 194.

43. Election petition—Status of petitioner—When to be determined
—R. S. C. c. 9, ss. 12 & 13.

In this case the respondent, by preliminary objection, objected to the status of the petitioner, and the case being at issue copies of the voters' lists for said electoral district were filed but no other evidence offered, and the court set aside the preliminary objection "without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision and the case went to trial, where the objection was renewed but was overruled by the trial judges who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court of Canada on the ground that the onus was on the respondents to prove their status, and that their status had not been proved.

Held, affirming the judgment of the court below that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection and disposed of, and the judges at the trial had no jurisdiction to entertain such objection. R. S. C. c. 9, ss. 12 & 13.

Prescott Election Case, Proulx v. Fraser.—xx. 196.

44. Dominion Controverted Elections Act—Appeal—Evidence—
Reversal—Loan for travelling expenses—Proof of corrupt intent—R. S. C. c. 8, ss. 88, 91; s. 84 (a) (e)—Free railway tickets.

G., a voter and supporter of the respondent, holding a free railway ticket to go to Listowel to vote and wanting two dollars for his expenses while away

Election—Continued.

from home, asked for the loan of the money from W., a bar-tender and friend. W. not having the money at the time applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G., to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G. W. returned the two dollars to S. the day before the trial. The judges at the election trial held that it was a *bona fide* loan by S. to W. On appeal to the Supreme Court of Canada :

Held, reversing the judgment of the court below, that as the decision of the trial judges depended on the inference drawn from the evidence their decision could be reviewed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. within the provisions of section 88 of The Dominion Elections Act and a corrupt practice sufficient to avoid the election under section 91 of the said Act.

Strong, J., dissenting, was of opinion that there was no evidence that the loan of the two dollars was made to G. with the corrupt intent of inducing him to vote for the respondent.

Patterson, J., dissenting on the ground that as the decision of the court below depended on the credibility of the witnesses it ought not to be interfered with.

Per Strong and Patterson, JJ., affirming the judgment of the court below, that upon the evidence, which is reviewed in the judgments, the Grand Trunk Railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case were free tickets, and that as the free tickets had been given to voters who were well known supporters of the respondent prepared to vote for him and for him alone, if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of section 88 of The Dominion Elections Act. *Berthier Election Case*, 9 Can. S. C. R. 102, followed.

North Perth Election Case, Campbell v. Grieve.—xx. 331.

**45. Election—Promise to procure employment by candidate—
Corrupt practice—Finding of the trial judges—R. S. C.
c. 8, s. 84 (b).**

On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising to a voter W. to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved. The promise was charged as having been made in the township of Thorold on the 28th February, 1891. At the trial it was proved that W. some time before the trial made a declaration upon which the charge was based, at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from the C. P. R. Co. until the trial took place, and W. swore that the promise had been made on the 17th February. G., the appellant, although denying the charge,

Election—Continued.

admitted in his examination that he intimated to W. that he would assist him, and there was evidence that after the election G. wrote to W. and did endeavour to procure him the situation, but the letters were not put in evidence, having been destroyed by W. at the request of the appellant.

Held, affirming the judgment of the court below, that as the evidence of W. was in part corroborated by the evidence of the appellant, the conclusion arrived at by the trial judges was not wrong, still less so entirely erroneous as to justify the court as an appellate tribunal in reversing the decision of the court below on the questions of fact involved.

Welland Election Case, German v. Rothery.—xx. 376.

46. *Election petition—Judgment—R. S. C. c. 9, s. 43—Enlargement of time for commencement of trial—R. S. C. c. 9, s. 33—Notice of trial—Shorthand writer's notes—Appeal—R. S. C. c. 9, s. 50 (b).*

In the Pontiac Election Case the judgment appealed from did not contain any special findings of fact or any statement that any of the charges mentioned in the particulars were found proved, but stated generally that corrupt acts had been committed by the respondent's agents without his knowledge, and declared that he had not been duly elected and that the election was void. On an appeal to the Supreme Court on the ground that the judgment was too general and vague:

Held, that the general finding that corrupt acts had been proved was a sufficient compliance with the terms of the statute R. S. C. c. 9, s. 43.

On the 10th October, 1891, the judge in this case within six months after the filing of the election petition by order enlarged the time for the commencement of the trial to the 4th November, the six months expiring on the 18th October. On the 19th October another order was made by the judge fixing the date of the trial for the 4th November, 1891, and fourteen clear days' notice of trial was given. The respondent objected to the jurisdiction of the court.

Held, that the orders made were valid. Ss. 31, 33, c. 9, R. S. C.

Held, also, 1. That the objection to the sufficiency of the notice of trial given in the case under s. 31 of c. 9, R. S. C. was not an objection which could be relied on in an appeal under s. 50 (b) of c. 9, R. S. C.

2. That evidence taken by a shorthand writer, not an official stenographer of the court but who has been sworn and appointed by the judge, need not be read over to witnesses when extended.

Pontiac Election Case, Murray v. Lyon.—xx. 626.

47. *Election petition—Judgment voiding election—Trial—Commencement of—Six months—Consent to reversal of judgment—R. S. C. c. 135, s. 52.*

Appeals from the judgments of the Superior Court for Lower Canada.

In these two cases the trials were commenced on the 22nd day of December, 1891, more than six months after the filing of the petition, and subject to

Election—Continued.

the objection taken by the respondents that the court had no jurisdiction, more than six months having elapsed since the filing of the petition and no order made enlarging the time for the commencement of the trial; the respondents consented that their elections be voided by reason of corrupt acts committed by their agents without their knowledge.

On appeal to the Supreme Court upon the question of jurisdiction the petitioner's counsel signed and filed a consent to the reversal of the judgment appealed from without costs, admitting that the objection was well taken.

Upon the filing of an affidavit as to the facts stated in the respondent's consent, the appeal was allowed and the election petition dismissed without costs. R. S. C. c. 135, s. 52.

Bagot Election Case, Dupont v. Morin; Rouville Election Case, Brodeur v. Charbonneau. —xxi. 28.

48. *Election appeal—Discontinuance—Effect of—Practice—Certificate of registrar—New writ.*

By a judgment of the Superior Court in the controverted election for the electoral district of L'Assomption, the appellant was unseated for corrupt practices by agents, and upon appeal taken by him to the Supreme Court the case was inscribed for hearing for the May sessions, 1892. When the appeal was called, no one appearing for the appellant, counsel for the respondent stated that he had been served by the appellant's solicitor with a notice of discontinuance, and the Supreme Court ordered that the appeal be struck off the list of appeals.

The notice of discontinuance having been filed in the registrar's office, the registrar certified to the Speaker of the House of Commons that by reason of such discontinuance, the decision of the trial judges and their report, were and are left unaffected by the proceedings taken in the Supreme Court. The Speaker subsequently issued a new writ for the electoral district of L'Assomption.

L'Assomption Election Case, Gauthier v. Brien.—xxi. 29.

49. *Election petition—Status of petitioner—Preliminary objection—Lists of voters—Dominion Elections Act, R. S. C. c. 8, ss. 30 (b), 31, 33, 41, 54, 58 & 65—The Electoral Franchise Act, R. S. C. c. 5, s. 32.*

Held, affirming the decision of Gill, J., that where the petitioner's status in an election petition is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election, or a copy thereof certified by the clerk of the Crown in Chancery, R. S. C. c. 8, ss. 41, 58 & 65, R. S. C. c. 5, s. 32, and the production at the *enquête* of a copy certified by the revising officer of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election is insufficient proof. Gwynne and Patterson, JJ., dissenting.

Richelieu Election Case, Paradis v. Bruneau.—xxi. 168.

Election—*Continued.*

50. Two petitions pending against appellant—Motion to join both petitions for trial—Refusal of by court—Election set aside on admission of bribery by agents—Judgment not appealable—R. S. C. c. 9, ss. 30 & 50.

See JURISDICTION, 110.

Electric Light.

- Municipal corporation—Duty to light streets—Flickering and going out of electric light not in itself evidence of negligence.

See MUNICIPAL CORPORATION, 20.

Engine—Agreement to discontinue use of traction engine—Construction of.

See AGREEMENT, 13.

Engineer—Certificate of.

See PETITION OF RIGHT, 1, 2, 8.

RAILWAYS AND RAILWAY COMPANIES, 9.

2. Decision of, binding as to price.

See CONTRACT, 17, 53.

And see CERTIFICATE OF ENGINEER.

Error—Remedy by writ of—Causing jurors to stand aside—Right of crown to “stand aside” after perusal of panel—Question of law arising at trial—Case reserved.

See CRIMINAL APPEAL, 13.

Escheat—Property of person dying intestate and without heirs escheats to crown for benefit of province.

See LEGISLATURE, 6.

Escrow.

See DEED, 1.

2. Policy not countersigned.

See INSURANCE, LIFE, 5.

3. Application for insurance—Policy in hands of agent.

See INSURANCE, MARINE, 33.

Estate.

See DISTRIBUTION OF ESTATE.

Estate Tail.

See WILL, 1.
MORTGAGE, 6.

Estoppel.

See DEED, 1.

2. Equitable—Adjoining owner of land allowing a boundary line to be run by a surveyor.

See BOUNDARY.

3. Shareholder not estopped from questioning legality of issue of stock.

See CORPORATIONS, 11.

4. *Equitable assignment — Garnishee process — Representation of indebtedness by defendants.*

Plaintiff held a judgment against one George Cutten, and was about to sue Ryerson and Moses, whom he understood to be Cutten's partners. Before doing so he consulted one of the defendants, by whom he was informed that there was a balance of some \$2,700 due from the defendants to Cutten, for work performed for the defendants on the Western Counties Railway under a contract, and defendants suggested that this amount might be made available to satisfy plaintiff's claim, if there was a garnishee law. Plaintiff's attorney, on the strength of this representation, issued garnishee process, when the defendants pleaded denying that there was any debt due.

Previous to the garnishee process being issued, Cutten had drawn an order, requesting defendants to pay all sums coming due to him under the engineer's monthly certificates to one Killam, but there was no evidence of any indebtedness of Cutten to Killam.

Held, affirming the judgment of the Supreme Court of Nova Scotia (2 Russ. & Geldert, 199), Strong and Gwynne, JJ., dissenting, that the defendants were estopped by their representation from denying their indebtedness to Cutten; and that there was not evidence of such an assignment as would prevent the attachment from operating on the fund.

Appeal dismissed with costs.

Shanly v. Fitzrandolph.—28th April, 1882.

5. Lands taken for railway—Debentures issued by county for damages awarded.

See JURISDICTION, 23.

Estoppel—Continued.

6. When possession of land fraudulently obtained through a tenant, the possessor cannot dispute landlord's title.

See POSSESSION, 5.

7. Improper construction of municipal drain—Action by ratepayer who has been a contractor—Acceptance of surplus money.

See CORPORATIONS, 34.

8. Trespass—Title to land—Boundary—Easement—Agreement at trial to try question of boundary only.

See BOUNDARY, 4.

9. Action against sheriff—Abandonment of seizure—Return to writ that goods seized.

See SHERIFF, 9.

10. *Petition of Right Act, 1876, s. 7—Statute of Limitations—32 Hen. VIII. c. 9—Rideau Canal Act, 8 Geo. IV. c. 1—6 Wm. IV. c. 16—7 V. c. 11, s. 29—9 V. c. 42—Deed—Construction of.*

Under the provisions of 8 Geo. IV. c. 1, generally known as The Rideau Canal Act, Lt.-Col. By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen as necessary for making and completing said canal, but only some 20 acres were actually used for canal purposes. Grace McQueen died intestate leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death on the 31st January, 1832, Alexander McQueen released to William McQueen all his interest in the said lands, and by deed of 6th Feb., 1832, the said William McQueen conveyed the whole of the lands originally granted to Grace McQueen to said Lt.-Col. By, in fee for £1,200. The appellant, the heir-at-law of William McQueen, by her petition of right, sought to recover from the Crown 90 acres of the land originally taken by Col. By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the Crown, and an indemnity for the value of such portions of these 90 acres as had been sold by the Crown.

Held, per Ritchie, C.J.—By the deed of the 6th Feby., 1832, the title to the lands passed out of William McQueen, but assuming it did not, he was estopped by his own act, and could not have disputed the validity and general effect of his own deed, nor can the suppliant who claims under him.

Per Strong, J.—This deed did not work any legal estoppel in favour of Col. By, which would be fed by the statute vesting the legal estate in William McQueen, the covenants for title by themselves not creating any estoppel.

Estoppel—Continued.

Per Fournier, Henry and Taschereau, JJ.—There could be no estoppel as against Wm. McQueen by virtue of the deed of the 6th February, 1832, in the face of the proviso in 7 V. c. 11.

McQueen v. The Queen.—xvi. 1.

11. Bond for faithful discharge of duty by government official—
Evidence of execution.

• See EVIDENCE, 35.

12. Transfer to trustee of mortgages, and of promissory notes given as collateral for price of sale—Assent of purchaser to transfer—Right of suit by trustees under law of Province of Quebec—Art. 19, C. C. P.—Prescription.

See TRUSTS AND TRUSTEES, 15.

13. *Lease of mining rights—Option of locating.*

J. McA. *et al.* (plaintiff's) *auteurs* having leased a certain portion of a lot of land for mining purposes described in the deed by metes and bounds with the following option: "Pourra le dit acquéreur changer la course des lignes et bornes du dit lopin de terre sans en augmenter les bornes, l'étendue ou superficie en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit, après que lui, le dit bailleur, aura prospecté le dit lopin de terre susbaillé," adopted certain lines of a survey made by one Proulx, as containing the vein of quartz. B. *et al.* (defendants') *auteurs* leased another portion of the same lot. In an action *en bornage* between the parties the court appointed three surveyors to fix the boundaries. Each surveyor made a separate report, and the report and plan of the surveyor Legendre, adopting Proulx's lines, was adopted and homologated by the court.

Held, affirming the judgment of the court below, Gwynne, J., dissenting, that plaintiff's *auteurs* having located their claim in accordance with the terms of their deed they were now estopped from claiming that their property should be bounded according to the true course of the vein of quartz, and that the judgment homologating the survey adopting Proulx's lines and survey was right and should be affirmed.

McArthur v. Brown.—xvii. 61.

14. Assignment in trust for creditors—Release by—Authority by creditors to sign—Ratification.

See ASSIGNMENT, 14.

15. Uncertificated solicitor—Allowing name to appear as member of firm in practice.

See SOLICITOR, 1.

Estoppel—Continued.**16. Landlord and tenant—Verbal lease—Expiration—Sub-tenancy
Notice to quit—Distress.**

See LANDLORD AND TENANT, 9.

17. Action on promissory note—Defence of forgery—Ratification.

See FORGERY, 3.

**18. Estoppel by conduct—Contract—Boomage—Repairs—Use of
booms free—36 V. c. 81, (P.Q.).**

F. McC. brought an action against G. B. for \$4,464 as due him for charges which he was authorized to collect under 36 V. c. 81, (P.Q.), for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. McC. and G. B. and his *auteurs*, and the interpretation put upon them by F. McC. the repairs to the booms were to be and were, in fact, made by him, and that in consideration thereof he was to be allowed to pass his logs free; and, also, pleaded compensation of a sum of \$9,620 for use by F. McC. of other booms, and repairs made by G. B. on F. McC.'s booms, and which by law he was bound to make.

Held, reversing the judgment of the court below, that there was evidence that F. McC. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to piers, &c., and that F. McC. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect.

Held, further, that even if F. McC.'s right of action was authorized by the statute the amount claimed was fully compensated for by the amount expended in repairs for him by G.

Ball v. McCaffrey.—xx. 319.

And see REVENDEICATION, 3.

**19. Title to land—Foreshire of harbour—Grant from local
government—Conveyance by grantee—Claim of dower by
wife of grantee—Objection to—Estoppel—Act of local legis-
lature confirming title—Validity of—Pleading.**

After the British North America Act came into force the government of Nova Scotia granted to S. a part of the foreshore of the harbour of Sydney, C.B. S. conveyed this lot through the C. B. Coal Co. to the S. & L. Coal Co. S. having died, his widow brought an action for dower in said lot to which the company pleaded that the grant to S. was void, the property being vested in the Dominion government.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Strong and Gwynne, JJ., dissenting, that the company having obtained title to the property from S. they were estopped from saying that the title of S. was defective.

Estoppel—Continued.

Per Strong and Gwynne, JJ., dissenting: The conveyance by S. to the C. B. Coal Co. was an innocent conveyance by which S. himself would not have been estopped and as estoppel must be mutual his grantees would not. There were no recitals in the deed that would estop them and estoppel could not be created by the covenants.

After the conveyance to the defendant company an Act was passed by the legislature of Nova Scotia ratifying and confirming the title of the defendant company to all property of the C. B. Coal Co.

Held, that if the legislature could by statute affect the title to this property which was vested in the Dominion government it had not done so by this Act in which the Crown is not expressly named. Moreover the statute should have been pleaded by the defendants.

The Sydney & Louisburg Coal and Ry. Co. v. Sword.—xxi. 152.

20. By conduct—Booms—Proprietary rights—Revendication.

See REVENDICATION, 3.

21. Missing deed—Execution and registration of.

See EJECTMENT, 3.

Eviction.

Construction of lease—Entry by lessor to repair—Intent—Suspension of rent.

See LANDLORD AND TENANT, 7.

Evidence—Special case—Further evidence.

Held, that when a case has, by consent of parties, been turned into a special case, and the judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the court has no power to add anything thereto, except with the like consent, and has no power to order any further evidence to be taken.

Smyth v. McDougall.—i. 114.

2. Admissibility of.

See SALE OF GOODS, 1.

3. Contradiction of witness.

See WITNESS, 1.

4. Evidence of plaintiff not admissible—Actions against administrators—Construction of s. 41, c. 96, R. S. N. S., 4th series.

C. sued M. & R. M. accepted service and acknowledged amount due, but R. pleaded to the action. Before trial both defendants died. Then C. R. & R. R., as administrators of R., were, before trial, made parties to the action.

Evidence—Continued.

At the trial C. was examined as a witness in support of his own case, and when asked what had taken place between him and the deceased M. & R., the learned judge ruled that the evidence was inadmissible under s. 41, c. 96 of the Revised Statutes of Nova Scotia, 4th series.

Held, affirming the judgment of the court below, that under said section, in an action against administrators made parties to an action after issue joined, but before trial, the plaintiff cannot give any evidence in his own favour of dealings with a deceased defendant. Henry, J., dissenting.

Chealey v. Murdock.—ii. 48.

5. *Rejection of—Promissory notes—Joint liability on—Misdirection as to interest.*

Plaintiffs sued W. upon two promissory notes signed by one T. E. and W. The notes were dated at Halifax and made payable to plaintiffs' order in Boston, U.S. The notes were stamped, but before action brought double stamps were affixed and no contract as to interest appeared on the face of them. W. pleaded, *inter alia*, that he had signed the notes upon an understanding and agreement that he should be liable thereon as surety only for T. E., and that plaintiffs, without his knowledge or consent, agreed to give and gave time to T. E., and forbore to enforce payment when they might have been paid. At the trial W. sought to cross-examine one of the plaintiffs on an affidavit made by the witness, and to which was annexed a letter to plaintiffs from T. E. This evidence was rejected by the judge, and a verdict was given for plaintiffs with interest. A rule *nisi* to set aside verdict was discharged by the Supreme Court of Nova Scotia, but they referred the rate of interest to a master of the court.

Held, that there was an improper rejection of evidence, and that the jury should have been directed as to interest.

Wallace v. Souther.—ii. 598.

6. *Of respondent in controverted elections admissible in province of Quebec.*

Somerville v. Lafamme.—ii. 216.

7. *Parol evidence of determination of suit by judgment inadmissible.*

In an action of damages for malicious arrest and imprisonment of plaintiff, under a *capias*, issued by a stipendiary magistrate in Nova Scotia, whose judgment, it was alleged, was reversed in appeal by the Supreme Court of Nova Scotia, oral evidence "that the decision of the magistrate was reversed" was deemed sufficient evidence by the judge at the trial of the determination of the suit below.

Held, reversing the judgment of the Supreme Court of Nova Scotia, (2 R. & C. 528) that such evidence was inadmissible, and was not proper evidence of a final judgment of the Supreme Court of Nova Scotia.

Gunn v. Cox.—iii. 296.

Evidence—Continued.

8. *Débats de comptes*—Sale of stock-in-trade by a father to his son.—*Onus probandi*—Affidavit of a person since deceased not evidence.

In a *débats de comptes* between A. G. (appellant), in his quality of tutor to M. L. H. C. R., a minor, and Dame H. P. (respondent), universal legatee of her late husband L. R., who had possession of the minor's property (his grandchild) as tutor, the following items, viz.:—\$5,466.63 (for stock of goods sold by L. R. to his son) and \$451.07 and \$90.76 for "cash received at the counter," charged by the respondent in her account, were contested. In 1871, L. L. R., the minor's father, married one M. C. G., and by contract of marriage obtained from his father, L. R., two immoveable properties, *en avancement d'hoirie*. At the same time L. R., the father, retired from business and left to L. L. R., his son, the whole of his stock-in-trade, which was valued at \$5,466.63, making an inventory thereof. L. L. R. died in 1872, leaving one child, said M. L. H. C. R., and L. R., her grandfather, was appointed her tutor. There was no evidence that the stock-in-trade had been sold by the father and purchased by the son, or that the father gave it to his son. However, when L. R., in his capacity of tutor to his grandchild, made an inventory of his son's succession, he charged his son with this amount of \$5,466.63.

Held, reversing the judgment of the court below, that it was for the respondent to prove that there had been a sale of the stock-in-trade by L. R. to his son L. L. R., the minor's father, and that there being no evidence of such a sale, the respondent could not legally charge the minor with that amount.

As to the other two items, these were granted to the respondent by the Court of Queen's Bench on the ground that, although they had been entered as cash received at the counter, there was evidence that they had been already entered in the ledger. The only evidence to support this fact was the affidavit of one Hébert, the book-keeper of L. R., since deceased, filed with the *reddition de comptes* before notary prior to the institution of this action.

Held, reversing the judgment of the court below, that the affidavit of Hébert was inadmissible evidence, and, therefore, these two items could not be charged against the minor.

Gagnon v. Prince.—vii. 386.

[In this case the Judicial Committee of the Privy Council refused leave to appeal.

The Judicial Committee held that they will not advise Her Majesty to admit an appeal from the Supreme Court of Canada save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character.

—8 App. Cases, 103—25th November, 1882.]

9. **Manslaughter**—Whether evidence as to assaults committed within year of death admissible.

See CRIMINAL APPEAL, 2.

Evidence—Continued.

10. Question for jury—Contract not under seal.

See AGREEMENT, 6.

11. Of acceptance of goods—Parol—Art. 1235 C. C. (P. Q.).

See SALE OF GOODS, 6.

12. Of special damages not alleged inadmissible.

See LIBEL.

13. Of professional draughtsmen to show what certain shadings and marks on plan are intended to indicate.

See EASEMENT, 1.

14. Of agent of company admissible under R. S. N. S. c. 96, s. 41, in action on policy of assurance by executor.

See INSURANCE, LIFE, 6.

15. Verdict against weight of.

See JURISDICTION, 23.

16. Parol, to show right to redeem.

See MORTGAGE, 8.

17. Of reasonable and probable cause.

See INSOLVENCY, 9.

18. Parol, to establish contract.

See SALE OF GOODS, 10.

19. Withdrawal of evidence from jury.

See NEW TRIAL, 3.

20. When whole evidence before the court, the case will not be sent back for a new trial.

See NEW TRIAL, 4.

21. *Where verdict affirmed by two courts on weight of—Appeal.*

The appellant appealed from two judgments of the Court of Appeal for Ontario, affirming judgments recovered against him by the respondent in two several actions brought on alleged contracts. The cases were tried before a judge without a jury, and the respondent obtained two verdicts. These

Evidence—Continued.

verdicts having been moved against, were sustained by the Courts of Queen's Bench and Common Pleas, respectively, and both by the Court of Appeal for Ontario.

On appeal to the Supreme Court, Held, that the judgment of the Court of Appeal should be affirmed.

Per Gwynne, J.—When a judge has tried a case without a jury and found a verdict, which verdict has been affirmed by two courts, this court, sitting in appeal, should not reverse the conclusion arrived at by the lower courts on the weight of evidence, unless convinced beyond all reasonable doubt that all the judges before whom the case came have clearly erred.

Appeal dismissed with costs.

[See also *Bellechasse Case*—Judgment of Taschereau, J., 5 C. S. C. R. 123.]

Bickford v. Howard—18 C. L. J. 422.—22nd June, 1883.

See also APPEAL, 4-9.

HUSBAND AND WIFE, 7.

SALE OF GOODS, 14.

22. Of notary, not admissible to contradict deed drawn by him.

See SALE OF LANDS, 9.

23. Of husband against wife, in action for removal of latter as executrix, not admissible.

See EXECUTOR, 5.

24. When new trial ordered—Evidence not so clear as to justify Appellate Court in interfering.

See TRESPASS, 12.

25. Of missing deed—Under law of N.S.

See EJECTMENT, 3.

26. Amendment of pleadings to conform to.

See LICENSE, 7.

27. Judgment of court of first instance on the evidence affirmed.

See APPEAL, 4, 5, 6, 7, 8.

ELECTION, 10, 18.

EVIDENCE, 21.

RAILWAYS AND RAILWAY COMPANIES, 23.

SALE OF GOODS, 14.

SOLICITOR AND CLIENT, 2.

Evidence—Continued.**28. Of fraud—Rescission of executed contract.**

See SALE OF LANDS, 14.

29. Verdict against weight of—New trial ordered by court below—Appeal will not be heard.

See JURISDICTION, 39.

30. Commencement of proof in writing—In case where fraud alleged and proved, not required.

See BANKS AND BANKING, 12.

31. Verdict against weight of—New trial ordered.

See NEW TRIAL, 14.

32. Agreement in writing—Collateral parol agreement, admissibility of.

See AGREEMENT, 16.

33. Indictment for perjury in answering to *faits et articles*—Negative averments—Proving special facts to establish falsity of answers—Admissibility of evidence.

See CRIMINAL APPEAL, 7.

34. Trial for murder—Expert medical testimony—Admissibility of.

See CRIMINAL APPEAL, 9.

35. Surety—Execution of bond—Evidence of execution.—Weight of evidence—Acceptance of bond—Proximate cause—Estoppel.

In an action by the crown against C. on a bond of suretyship for the faithful discharge by a government official of his duties as such, the defendant, under a plea of *non est factum*, swore that he signed the bond in blank—that he made no affidavit of justification—and that the certificate of the magistrate of the execution of the bond, as required by the statute, was irregular and unauthorized. The attesting witness to C.'s execution of the bond, and the magistrate, each swore to the correctness of his own action, and that C. must have properly executed the bond or the affidavit would not have been made or the certificate given.

Held, *per* Ritchie, C.J., Strong, Fournier and Gwynne, JJ., reversing the judgment of the Supreme Court of N. S., (6 R. & G. 313), that the weight of evidence was in favour of the due execution of the bond by C.

Per Patterson, J., that C. was estopped from denying that he had executed the bond.

Evidence—Continued.

Held also, per Patterson, J., reversing the judgment of the court below, that the execution of the bond, and not the certificate of the magistrate, was the proximate, or real, cause of its acceptance by the crown.

The Queen v. Chesley.—xvi. 306.

36. Assault on constable serving summons charging violation of Canada Temperance Act—Wife of defendant not a competent witness—R. S. C. c. 162, s. 34—R. S. C. c. 174, s. 216.

See CRIMINAL APPEAL, 11.

37. Indictment for manslaughter—Two or more names under an *alias*—No evidence of one name—Variance.

See CRIMINAL APPEAL, 12.

38. *Admissibility of—Entries in books—Goods charged to third party—Verdict against evidence—New trial.*

McK. was a member of two firms, C. McK. & Co. and McK. & M. In an action against McK. & M. for goods sold and delivered it appeared on the trial that the goods were ordered by McK. and shipped to the place of business of McK. & M., but were charged in the plaintiff's books to C. McK. & Co., which he said was done at McK.'s request. McK., called as a witness for the plaintiff, corroborated this, and on cross-examination he produced, subject to objection, the books of C. McK. & Co., in which these goods were credited to that firm. A verdict was given for the defendant, M.

Held, reversing the verdict of the court below, that the books of C. McK. & Co. were properly in evidence on the cross-examination of McK., and the rule for a new trial should be discharged.

Miller v. White.—xvi. 445.

39. *Lost writing—Proof of handwriting—Subsequently acquired knowledge—Change of signature.*

That a document not in existence was written by a particular individual may be proved by a person who has had possession of and destroyed it, though he only acquired knowledge of the handwriting of the alleged writer some weeks after the document was destroyed and could only say that from his recollection of the document it was written by the same person. Gwynne, J., dissenting.

In an action for a written libel defendant was asked, on cross-examination, if he had not changed his signature since the action began, which he denied.

Held, Gwynne and Patterson, JJ., dissenting, that documentary evidence was admissible to show that the signature had been changed.

Per Patterson, J.—The witness could properly be asked, on cross-examination, if he had not changed his signature, but the opposing party must be

Evidence—Continued.

satisfied with his answer, and could not go further and give affirmative evidence of the fact.

Alexander v. Vye.—xvi. 501.

[Leave to appeal in this case was refused by the Judicial Committee of the Privy Council].

40. Use of running water—Long established industry—Pollution—Injunction.

See NUISANCE, 8.

41. Partnership—Evidence of—Names of partners on letter heads.

The representation of an agent that his principals are a firm in a distant province, and that such firm is composed of A. and B., coupled with the evidence of receipt by the person to whom the representation is made of letters from one of the alleged members of the firm, written on paper on which the names of such members are printed, in answer to letters from such persons, is *prima facie* evidence that A. and B. constitute said firm.

McDonald v. Gilbert.—xvi. 700.

42. Goods sold and delivered—Credit—Direction to jury—Withdrawal of evidence from jury—New trial.

In an action against McK. & M. for goods sold and delivered, the plaintiff swore that he had sold the goods to the defendants and on their credit, and his evidence was corroborated by the defendant McK. The defence showed that the goods were charged in the plaintiff's books to C. McK. & Co., (the defendant McK. being a member of both firms), and credited the same way in C. McK. & Co.'s books, and, that the notes of C. McK. & Co. were taken in payment, and it was claimed that the sale of the goods was to C. McK. & Co.

The trial judge called the attention of the jury to the state of the entries in the books of the plaintiff and of C. McK. & Co., and to the taking of the notes, and to all the evidence relied on by the defence, and he left it entirely to the jury to say as to whom credit was given for the goods.

Held, affirming the judgment of the Supreme Court of New Brunswick, 27 N. B. Rep. 42, Strong and Patterson, JJ., dissenting, that the case was properly left to the jury and a new trial was refused.

Present:—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne, and Patterson, JJ.

Miller v. Stephenson.—June 14th, 1889—xvi. 722.

43. Demolition of dam—Report of expert—Motion to hear further evidence—Remitting case back.

See TRANSACTION.

Evidence—Continued.

44. Construction of will—Intention—Admissibility of evidence to establish—Joint tenancy or tenancy in common.

See WILL, 20.

45. Municipal aid to railway company—Debentures signed by warden *de facto*—Completion of railway—Evidence of—*Onus probandi*.

See RAILWAYS AND RAILWAY COMPANIES, 52.

46. Crown lands—Setting aside letters patent—Error and improvidence—*Scire facias*.

See LETTERS PATENT, 2.

47. Marine insurance—Total loss—Finding of jury, one which reasonable men might have arrived at—Right to recover for partial loss.

See INSURANCE, MARINE, 30.

48. *Company—Winding-up—Possession of books by manager—Refusal to deliver up—Evidence.*

G. was the manager for the Ottawa district of a lumber company whose headquarters were in Edinburgh and whose head office for Canada was in Toronto. The company having gone into liquidation an order was obtained from the Court of Sessions in Edinburgh for the delivery of its books by the manager to the liquidator or to some person appointed by him. This order not having been obeyed an action was brought by the company to recover possession of the books, from G. who set up the defence that he had already given them up, and also that the company had no *locus standi* to maintain the action. The evidence given on the hearing showed that after the proceedings in liquidation were commenced G. was dismissed from his employment as manager, whereupon he demanded an audit of the books which was commenced but never completed, and G. swore that after handing over the books to the auditors he had never had possession of them. He also swore that they had never been in his control, having been kept in a safe of which a clerk of the company and the new manager alone had the combination. It was shown by the plaintiffs, however, that some time after the audit an agent of the liquidator went to Ottawa to get the books and saw G., who first agreed but afterwards refused to deliver them up, giving as the ground of his refusal that he was liable for the rent of the office, and for other debts of the company, and that he wished to retain what property of the company he had to protect himself. The agent, with the assistance of G.'s landlord, then obtained access to the office where he saw some books which he took to belong to the company, and a safe in which he believed there were others, but G. coming in refused to allow him to remove them and ejected him from the

Evidence—Continued.

office. On this evidence the trial judge made an order against G. directing him to deliver to the liquidator all the books and papers of the company in his possession or under his control. This decision was affirmed by the Divisional Court and the Court of Appeal for Ontario. On appeal by G. to the Supreme Court of Canada :

Held, that the books having been shown to have been in the possession of G. at the date of the visit of the liquidator's agent to Ottawa, and the defendant not having attempted to show what became of them after that date, and his testimony that he did not know what had become of them having been discredited by the trial judge, there was no reason for interfering with the order appealed from.

Present :—Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Grant v. The British Canadian Lumber Co.—June 12, 1890—xviii. 708.

49. *Question of fact—Finding of trial judge—Interference with an appeal.*

T., a solicitor, brought an action against the officers of the Liberal-Conservative Association of the East Riding of Northumberland for services alleged to have been rendered as their solicitor and counsel in the matter of an election petition against the return of the member for the Riding in the Legislative Assembly of Ontario. At the trial of the action the plaintiff swore that he was duly appointed solicitor to carry on the election petition by resolution passed at a meeting of the association, and that in consequence of such resolution he acted as such solicitor in the conduct of the petition. The defence to the action was that no such appointment was made, or if it was that the plaintiff agreed to render his services gratuitously, and the evidence given for the defendants was that the plaintiff offered his services free of charge, and that it was decided to protest the election in consequence of such offer. The trial judge held that no retainer of the plaintiff was proved and dismissed the action. His decision was reversed by the Queen's Bench Division, and their decision in its turn was reversed by the Court of Appeal for Ontario, and the judgment of the trial judge restored. On appeal by the plaintiff to the Supreme Court of Canada :

Held, affirming the judgment of the Court of Appeal, that the question being purely one of fact which the trial judge was the person most competent to determine from seeing and hearing the witnesses, and it not being clear beyond all reasonable doubt that his decision was erroneous, but, on the contrary, the weight of evidence being in its favour, his judgment should not be interfered with on appeal.

Present :—Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Titus v. Colville.—June 12, 1880.—xviii. 709.

Evidence—Continued.**50. Improper admission—Cross-examination—Conversation partly given on examination in chief—Belief as to signature on note—Evidence of counsel.**

To an action on a bond the defendants pleaded that it was given in settlement of promissory notes made by a brother of defendants the indorsements to which were forged to the knowledge of plaintiffs, which settlement was the only consideration for the execution of the bond. On the trial a verdict was given for plaintiffs which was set aside by the full court and a new trial ordered on the ground of improper admission of evidence as follows: 1st, evidence by a solicitor of what one of the officers of the plaintiff bank had told him relative to an admission by the alleged forger that the notes were genuine; part of this conversation, which related to a different matter, had been given in evidence by the same witness on direct examination, but the court below held that the balance could not be given on cross-examination as it was not connected with what had been already proved. 2nd, evidence by counsel for plaintiffs in the proceedings on the notes which had led to the making of the bond of his belief in their genuineness, which the court below held was not good evidence. Upon appeal to the Supreme Court of Canada from the judgment ordering a new trial,

Held, That the evidence objected to was properly admitted and that the judgment of the Supreme Court of N. B. should be reversed.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Halifax Banking Company v. Smith.—Nov. 3, 1890.—xviii. 710.

51. Weight of—Admissibility—Grounds for admission urged at trial—New grounds taken on appeal—Effect of.

In an action on a policy of insurance against fire on a stock of goods the verdict for the plaintiff was moved against on the grounds of its being against the weight of evidence and of improper exclusion of evidence. The first ground was mainly urged in regard to the amount of damages. As to the second ground the evidence tendered related to the fact that a quantity of unburnt matches and shavings had been found near the part of the premises in which the fire occurred where the bulk of the goods were alleged to have been burnt. The evidence was rejected by the trial judge for the reason that there was no defence pleaded that the fire was incendiary, and on appeal to the full court below it was for the first time urged that it was admissible as showing the nature and extent of the fire in the vicinity. The verdict for the plaintiffs was sustained by the full court. On appeal to the Supreme Court of Canada:

Held, Gwynne, J., dissenting, that the decision of the Supreme Court of Nova Scotia should be affirmed.

Per Ritchie, C.J., that though the amount of the damages found in the case was not satisfactory and might well have been submitted to a jury of business men as a question proper for their determination he would not

Evidence—Continued.

dissent from the judgment dismissing the appeal. As to the other ground the evidence was rightly rejected. When evidence is tendered the judge and opposing counsel are entitled to know the ground on which it is offered and none can be urged on appeal that has not been put forward at the trial.

Present:—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Royal Ins. Co. v. Duffus—Dec. 9th, 1890—xviii. 711.

52. Agreement for transfer of vessel—Absolute or conditional sale—Findings of fact.

In a suit for an account of the earnings of a steamer transferred to the defendants by the plaintiff the case had been heard and judgment given when defendants made application to be allowed to put in newly discovered evidence, which was refused by the court below but allowed by the Supreme Court of Canada, which latter court also gave leave to both parties to amend their pleadings. The original answer of the defendants to the action alleged that the transfer of the steamer was made by the plaintiff as security for all advances made or to be made, while plaintiff claimed that it was only as security for a fixed amount. After the order of the Supreme Court of Canada defendants set up a new case, namely, that the transfer was absolute in consideration of an annuity of \$1,000 to be paid to plaintiff during his life. This defence was raised in accordance with the newly discovered evidence which consisted of an agreement purporting to be executed by plaintiff to transfer to defendants said steamer and all power and control over the same in consideration of such annuity and to execute an absolute bill of sale thereof to defendant. Pursuant to the order of the Supreme Court evidence was taken of the execution of this agreement and resulted in a judgment by the judge in equity of Nova Scotia who heard the case, declaring that it did not contain the true agreement between the parties, that it was executed by plaintiff while intoxicated and incapable of transacting business and that the only consideration for the transfer to the defendant was the fixed sum stated by plaintiff, and he ordered an account to be taken as to the state of the general accounts between the parties. This judgment having been affirmed by the Supreme Court of Nova Scotia *in banc*,

Held, that under the evidence and considering the nature of the transaction and all the circumstances attending it the courts below could not have found otherwise than they did and their decision should be affirmed.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Seeton v. King.—Dec. 11th, 1890—xviii. 712.

53. Receipt—Error—Parol evidence—Arts. 14, 1234, C. C.

S. brought an action to compel V. to render an account of the sum of \$2,500, which S. alleged had been paid on the 6th October, 1885, to be applied to S.'s first promissory notes maturing and in acknowledgment of which V.'s book-keeper gave the following receipt: "Montreal, October 6th, 1885. Re-

Evidence—Continued.

ceived from Mr. D. S. the sum of two thousand five hundred dollars to be applied to his first notes maturing. *M. V.*, per *F. L.*" and which *V.* failed and neglected to apply. *V.* pleaded that he never got the \$2,500 and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given the Superior Court for Lower Canada whose judgment was affirmed by the Court of Queen's Bench, dismissed *S.*'s action. On appeal to the Supreme Court of Canada:

Held. 1. That the finding of the two courts on the question of fact as whether the receipt had been given through error should not be interfered with.

2. That the prohibition of Art. 1234 C. C. against the admission of parol evidence to contradict or vary a written instrument, is not *d'ordre public*, and that if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a court of appeal.

3. That parol evidence in commercial matters is admissible against a written document to prove error. *Ætna Insurance Company v. Brodie* (5 Can. S. C. R. 1), followed.

Schwarsenski v. Vineberg.—xix. 243.

54. Title to land—Possession—Nature of—Statute of limitations.

See POSSESSION, 10.

55. *Railway Co—Injury to property by—Question of fact as to party liable.*

F. brought an action on the case against the G. T. Ry. Co. for having been deprived of access from his property to the street by the building of an embankment. The defendants claimed that the work was done by the P. & C. Lake Ry. Co. who were the parties, if any liable, to plaintiff:

Held, affirming the judgment of the Court of Appeal for Ontario and of the Divisional Court, that the evidence established the liability of the defendants.

The Grand Trunk Ry. Co. v. Fitzgerald.—xix. 359.

56. *Contract—Quality of work—Conversation between the parties—Claim for increased price.*

R. & McR. contractors for the mason work on a portion of the line of the G. T. Ry. Co. made a sub-contract with the plaintiffs *B. & S. McR.*, one of the defendants and *S.* one of the plaintiffs had some conversation on different occasions as to the quality of the work, difficulty having arisen on the point. The Supreme Court **Held**, affirming the judgment of the Court of Appeal for Ontario and of the Divisional Court that the evidence supported the claim of the plaintiffs.

Ross v. Barry.—xix. 360.

Evidence—Continued.**57. Election appeal—Preliminary objections—Status of petitioner—Onus probandi.**

By preliminary objections to an election petition the respondent claimed the petition should be dismissed because the said petitioner had no right to vote at said election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed :

Held, per Ritchie, C.J., and Taschereau and Patterson, JJ., that the *onus probandi* was upon the petitioner to establish his status and that the appeal should be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence the appeal should be allowed without costs.

Fournier and Gwynne, JJ., *contra*, were of opinion that the *onus probandi* was on the respondent. *The Megantic Election Case*, 8 Can. S. C. R. 169, discussed.

Stanstead Election Case—Rider v. Snow.—xx. 12.

58. Election petition—Status of petitioner—Onus probandi.

The election petition was served upon the appellant on the 12th of May, 1891, and on the 16th of May the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners and the court dismissed the objections. On appeal to the Supreme Court :

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that the *onus* was on the petitioners to prove their status as voters. *The Stanstead Case*, 20 Can. S. C. R. 12, followed.

Bellechasse Election Case—Amyot v. Labrecque.—xx. 181.

59. Election trial—Decision of trial judges—Deduction from inferences—Appeal.

See ELECTION, 44.

60. Election trial—Proof of corrupt practice—Corroboration of evidence of voter—Finding on.

See ELECTION, 45.

61. Statute of frauds—Absolute deed—Undisclosed trust—Deed in name of third party—Parol evidence.

See SPECIFIC PERFORMANCE, 5.

Evidence—Continued.**62. Deed absolute in form intended to operate as mortgage—Intention—Character of evidence of.**

To induce a court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only the evidence of such intention must be of the clearest, most conclusive and unquestionable character.

McMicken v. The Ontario Bank.—xx. 548.

63. Sale of goods—Partners—To whom credit given—Entries of other goods on previous dealings—Evidence of Partnership—New trial unless reduction of verdict assented to.

The three plaintiffs, Patrick, Jeremiah and Thomas O'Brien were partners in lumbering transactions and had admittedly, as such partners, under the firm name of P. O'Brien & Bros. dealings with the defendant from 1879 to the fall of 1882. At the end of 1880, 1881 and 1882 the parties had a settlement of accounts, showing a balance due on each settlement from the defendant to the plaintiffs, the total of the three balances being \$3,427.05, for which the plaintiffs brought their action. The defendant set off a claim larger than that of the plaintiffs for goods supplied to the partnership in 1883 and 1884, but the plaintiffs contended that the partnership, to the knowledge of the defendant, had been dissolved in 1882 and that the goods had been supplied by the defendant to Patrick O'Brien alone. The defendant denied that he knew of the dissolution of the partnership.

During the period between the fall of the year 1882 and the year 1884, while some of the entries in the defendant's books showed the charges to have been made against P. O'Brien & Bros., numbers of the entries, in fact the greater number of them, were made against P. O'Brien alone. The defendant's counsel, to meet and answer any inference that might be drawn against the defendant from such entries, proposed to prove, and did establish by the evidence of the defendant, by reference to his books, that from the year 1879 to the fall of the year 1882 (when admittedly the plaintiffs were partners) the defendant kept his books in the same manner, making the charges sometimes against P. O'Brien, and at other times against P. O'Brien & Bros.

The Supreme Court of New Brunswick **Held**, Wetmore, J., dissenting, that this evidence was rightly admitted; and also, that it was not misdirection to tell the jury that in considering the question of partnership since 1882 they might, in connection with the other facts of the case, consider the way in which the defendant kept his accounts both before and after that date and whether he was dealing differently with the plaintiffs after 1882, from his mode of dealing with them before that.

It was held further that in the amount awarded to the defendant was included a sum of \$1,209.50 for goods, of the delivery of which the proof was insufficient, and that unless the defendant consented to a reduction of his balance by that amount there should be a new trial. See 27 N. B. R. 145.

On appeal to the Supreme Court of Canada it was **Held**, that the judgment of the Supreme Court of New Brunswick should be affirmed and the appeal

Evidence—Continued.

dismissed, the majority of the judges (Ritchie, C.J., and Taschereau and Patterson, JJ.) being of opinion that the evidence objected to was properly admitted and that, taking the charge of the learned judge at the trial as a whole, there was no misdirection. Strong and Gwynne, JJ., dissenting.

Per Patterson, J.—The objection to the use of the defendant's books as evidence is effectually met by the circumstance that they were first put in evidence by the plaintiffs. The plaintiffs appear to have appealed to the books with the idea that they would show a change in the defendant's mode of dealing with them after the settlement of 1882, that the later entries would appear to be against Patrick O'Brien without the brothers, and would thus indicate a recognition by the defendant of the partnership having ceased. To rebut this inference, it was proper for the defendant to exhibit the earlier accounts in support of his assertion that the same mode of bookkeeping had prevailed through all the years. But when the point made by the plaintiffs had thus been neutralised, the defendant's right to use his own books as evidence was exhausted. The books might or might not indicate that after 1882 he had continued to regard the plaintiffs as partners in the same manner as he had done from 1879 to 1882. If they showed knowledge on the part of the defendant that the partnership had ceased, they would be cogent evidence for the plaintiffs, but if they merely indicated that the defendant was not aware of any change, they would leave the issue of partnership or no partnership untouched.

It is complained that Mr. Justice Tuck gave the jury to understand that weight might be given in favour of the defendant, on the substantial issue as to the partnership, to the fact that he continued to make his entries in the same way as he had done in the earlier years. There are some expressions in the charge of the learned judge, as reported, which are perhaps susceptible of being so construed, but they do not appear to me to be so intended, nor am I so satisfied that the jury would be probably misled by them, as to feel called upon to interfere on that ground with the judgment of the court below.

The reduction of the verdict was done with the consent of the defendant and it amounted in effect to holding that, as to those particular items, there was not evidence for the jury. What was done differs in principle from the reduction of a verdict for unliquidated damages with the assent of the plaintiffs.

I know of no principle on which the other party can insist that a new trial shall be granted for the purpose of investigating claims which are in effect abandoned. In *Belt v. Lawes* (12 Q. B. D. 256) the power of the Court to reduce a verdict for unliquidated damages with the assent of the plaintiff, and against the will of the defendant who asks for a new trial on the ground of excessive damages, was discussed and formally affirmed by the Court of Appeal. The right of a party to relieve himself from embarrassment caused by an excessive recovery is further exemplified by the practice of entering a *remittitur damna* on the roll, instances of which will be found in the Upper Canada cases of *Jordan v. Marr* (4 U. C. Q. B. 53) and *Thomas v. Hilmer* (4 U. C. Q. B. 527).

Evidence—Continued.

Besides, the matter is after all a matter of practice, with which an appellate Court should be slow to interfere when no substantial injustice is done.

The question of partnership or no partnership was one of fact. I cannot say that the court below was wrong in holding that there was evidence for the jury that the dealings on which the set-off was founded were with the three plaintiffs as partners, as the contracts and dealings of the previous years had been.

Per Gwynne, J.—The evidence failed to establish a partnership between the plaintiffs, or any joint liability by them to the defendant in respect of the goods charged for in his set off.

Further, the practice of refusing to grant a new trial upon condition of the party in whose favour a verdict has been rendered by a jury agreeing to accept a reduced amount named by the court, has been confined to cases of objection taken for excessive damages only, and has not been applied to a case like the present.

Present: Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

O'Brien v. O'Brien.—10th March, 1890.

64. Letter of guarantee by bank — Claim for loss — Proof of — Account sales.

See GUARANTEE.

65. Promissory note—Liability on—Maker or endorser—Intention.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 25.

66. Fire insurance — Insurable interest—Agreement to cut and store ice—Construction of—Insurance by purchaser of ice —Admissibility and evidence of.

See INSURANCE, FIRE, 27.

67. Aged and infirm witness—Death of, after trial—Inutility of new trial.

See SHIPS AND SHIPPING, 14.

68. Libel—Pleading “not guilty” and “fair comment”—Reception of evidence to prove personal dishonesty—Rejection of evidence tendered in rebuttal—General verdict—New trial.

See LIBEL, 8.

Exchange—of lands.

See SPECIFIC PERFORMANCE, 7.

Execution—Order directing payment of part of verdict as condition of stay of execution illegal.

See DAMAGES, 25.

2. Premature issue of writ of—Irregularity.

See FRAUDULENT PREFERENCE, 2.

3. *Sale of railway shares en bloc*—Art. 595, 599, C. C. P.

Where a number of shares of railway stock were seized and advertised to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken into execution, such sale in the absence of proof of fraud or collusion was held good and valid.

Connecticut & Passumpsic Rivers Ry. Co. v. Morris.—xiv. 318.

4. Chattel mortgage—Possession of goods under—Proviso as to selling by mortgagor—Seizure of goods under execution by mortgagee—Setting aside as against good faith.

See CHATTEL MORTGAGE, 9.

5. Execution creditor—Lien of for costs under R. S. O. 1887, c. 124, s. 9.

See ASSIGNMENT, 13.

6. *Writs of execution*—Seal—Signature of prothonotary.

In province of N. S. writs of execution need not be signed by the prothonotary of the court. It is the seal of the court which gives validity to such writs, not the signature of the officer.

Archibald v. Rubley—xviii. 116.

See CHATTEL MORTGAGE, 11.

Execution Debtor.

See TROVER.

Executors—*Liability of (P. Q.)—Débat de compte—Interest—Prescription.*

Respondents, representing one of the universal residuary legatees of one W. D., sen., sued appellants as joint testamentary executors of the said W. D., sen., to render an account and pay over the balance of the estate in their hands. On a *débat de compte* the total value of the estate was proved to be worth \$44,525.65. Of this amount appellants in their said capacity, as appeared by an account rendered by them, took possession of \$14,510.33. The

Executors—Continued.

balance of \$30,015.33 appeared by the books of W. D. & Co., to be due to the estate of W. D., sen., by W. D., jun., one of the executors, and to have never come into the possession of the other executors.

Held, that under Art. 913, Civil Code L. C., appellants were jointly and severally responsible only for the amount they took possession of in their joint capacity, and, therefore, that W. D., jun., alone was responsible for the amount of such balance. Taschereau, J., dissenting.

2. That testamentary executors cannot legally be charged with more than six per cent. interest on the moneys collected by them, after their account has been demanded, in the absence of proof that they realized a greater rate of interest by the use of such moneys.

3. That entries in merchants' books, regularly kept, and unchanged during a term of years, with an annual rendering of accounts conforming to such entries to creditors, make proof against such merchants, particularly after the death of the creditors.

4. That an action against executors for an account of their administration, and of the moneys they have received, or ought to have received, in their said capacity, cannot be prescribed otherwise than by the long prescription of 30 years.

Darling v. Brown.—ii. [2] 26.

2. Powers of.

See WILL, 9.

3. Action by on policy of assurance.

See INSURANCE, LIFE, 6.

4. *Executor, judgment against and sale of lands under—Debt to be proved as against heir—Pro-tutor, action against for an account—Jurisdiction, plea to—Property in Quebec and Ontario—Negligence—Duty to administer en bon père de famille—Liability of for interest—Civil Code, Art. 290, et seq.*

Robert F. Coleman and Maria Mansfield Connolly were married at Belleville, in Ontario, on the 4th of November, 1841. The issue of this marriage were two children, Susanna Louisa Coleman and Anna Maria Coleman, the female plaintiff, who was born in 1846. Robert F. Coleman made his will at Belleville on the 10th of February, 1852, giving his wife the enjoyment of his property during her life, or until she re-married, and the property to his children. He appointed his wife, Lewis Wallbridge and William Hope his executors, and died in 1852. Wallbridge and Hope both renounced the executorship. On the 11th of June, 1853, Mrs. Coleman made her will at Montreal, whereby she bequeathed all her property to her two children, and appointed the defendant and Francis Mullins as her executors, authorizing them to continue the execution of the will of her late husband. She also appointed them tutors to her children, to take care of them until their marriage or their age of majority.

Executors—Continued.

The defendant was then married to a sister of Mrs. Coleman, and was therefore the maternal uncle of the female respondent and of her sister. Mrs. Coleman died on the 25th of June, 1853. Her property consisted of one quarter of lot No. 1, in the 1st range of the parish of Chateauguay. The children had, besides, the property left to them by their late father, which consisted of a lot of land, with mill and two houses, at Belleville, against which there were several mortgages, registered, amounting to about \$5,000. On the 12th of June, 1854, Catherine Connolly, a sister of Mrs. Coleman, died intestate, and her property, consisting of one undivided half of certain lots of land on Drummond street, Montreal, went to her brother, Patrick Connolly, and to her sisters, Rosanna, Susan and Sarah Connolly, and to her two nieces, the female plaintiff and her sister, as representing their late mother, who thereby became possessed of one-fifth in the undivided half of said two lots of land on Drummond street. On the 2nd of May, 1856, Susanna Connolly, the wife of the defendant, made her will and bequeathed to him the undivided half of the lots of land on Drummond street for the use and benefit of her two nieces, the female plaintiff and her sister; Mrs. Miller (Susanna Connolly) died shortly after. In 1861, Susanna Louisa Coleman died a minor, leaving the female plaintiff as her sole heir. Patrick Connolly died about 1862, intestate, and the female plaintiff, his niece, inherited one-fourth of his estate, which consisted of his share of the Chateauguay farm and of one-fifth in one undivided half of the Drummond street lots. On the 3rd of August, 1864, Sarah Connolly gave to the female plaintiff her share in the Drummond street property, which apparently consisted of one-fifth and one-fourth in another fifth of one undivided half of said lots. The defendant accepted this donation for the female plaintiff, and assumed in the deed the quality of tutor. In July, 1867, the female plaintiff became of age, and on the 21st of April, 1868, she married Louis Edmond Amédée Globensky. They are separated as to property. A few days before her marriage, that is, on the 9th of April, 1868, the female plaintiff gave a full discharge to the defendant, as having been executor to her mother's last will; she acknowledging by this discharge, that he had rendered to her a true and faithful account of his administration. On the 2nd November, 1868, the female plaintiff, being authorized by her husband, sold to the defendant all the rights and shares she had in an undivided half of the Drummond street property, for \$5,000, which sum she acknowledged to have previously received. It is admitted, however, by the defendant that he then only paid to her a sum of \$360, leaving the sum of \$4,640, to be accounted for. The property sold by this deed was not the undivided half bequeathed by Mrs. Miller to the defendant for the use of her nieces, but the shares which came to the female plaintiff by the death of Catherine and Patrick Connolly, by the donation from Sarah Connolly and by the decease of her own sister. These shares consisted of one-half, or about one-half, of the undivided half of the lots on Drummond street, or one-fourth of the whole. This appears from the terms of the deed, and also from the fact that the defendant claimed the other half as having been bequeathed to him by his wife. The female plaintiff, alleging in her declaration that the defendant had had the management of all her property since the death of her mother (25th of June, 1853,) that the discharge of the 9th April, 1868, was null, having been obtained by fraud and without a previ-

Executors—Continued.

ous account by the defendant of his administration of her estate and property, and that the sale of the 2nd of November, 1868, of the Drummond street property, was also null, as having been made to the defendant before he had rendered an account of his administration, and further that the defendant had in his hand property belonging to her to the amount of \$60,000, prayed that the discharge of the 9th of April, 1868, and the sale of the 2nd of November, 1868, be set aside, and that the defendant be condemned to account to her, for his administration of her property, or to pay to her \$60,000, and that he be held to be *contrainable par corps*.

To this action the defendant pleaded:—

1st. Cumulation of action, inasmuch as the plaintiff asked by the same action an account of defendant's administration and the rescission of the deed of sale of the 2nd of November, 1868; 2nd. That the plaintiff sold her share of the Chateauguay property on the 9th of June, 1875, and that he never had the administration of it, nor received any rent from said property; 3rd. That Susanna Connolly, his wife, had bequeathed the one undivided half of the Drummond street property to him, and that she had authorized him to dispose of it for the interest of the plaintiff and of her sister, and that under that bequest he was entitled to the enjoyment of that property during his life; 4th. That the Belleville property was sold by the sheriff on the 15th of February, 1865, to John Bell for \$300, and a deed given of it on the 6th of October, 1865, and that he, the defendant had purchased the property from Bell in 1868. The property was sold by defendant in 1870 for \$6,250; 5th. That the plaintiff had given him a full discharge on the 9th of April, 1868, and he further denied all the allegations of the declaration.

On the first plea, the Superior Court held that there was cumulation of action and ordered the respondent to make her option between her action *en reddition de compte* and her demand to annul the sale of the 2nd of November, 1868.

The plaintiff did not appeal from this judgment, although the court of Q. B. and also the Supreme Court of Canada appear to have been of opinion that it was erroneous, but made her option to proceed with her action *en reddition de compte*.

On the 29th of December, 1871, the discharge given by the respondent was held to be valid, and her action was dismissed.

This judgment was reversed by the Court of Review, whose judgment was confirmed by the court of Q. B., and the defendant was condemned to render an account of his administration. By some oversight the Court of Review did not formally declare the discharge null and void, and as its judgment was confirmed as rendered, there was no express adjudication setting aside the discharge, although it was virtually annulled by the order given to the defendant to account, on the ground that he had not previously properly accounted for his administration of the plaintiff's property.

On the 6th October, 1875, the defendant, in pursuance of this judgment, rendered an account by which he credited the respondent with an amount of \$12,224.05, including \$4,640, being the balance of the sale of the Drummond

Executors—Continued.

street property, and he charged her with a sum of \$33,116.82 for disbursements and interest, leaving a balance in his favour of \$20,892.77, which he claimed by an incidental demand.

In this incidental demand, the defendant raised the objection that the action should have been in Ontario, where the property administered by the appellant was situated.

The Superior Court (Sicotte, J.) held that the judgment ordering defendant to account settled the question of the liability to account and the quality in which he was liable, that whether considered as a mandatory, a *negotiorum gestor*, or as a pro-tutor, the defendant having confused his own revenues with those of his ward had acted negligently and contrary to the duty incumbent upon him, and was liable for interest in any case if a *reliquataire*, Art. 1714, C. C., and to *contrainte par corps*, Art. 290, C. C.

All interest, therefore, charged on expenditure was struck out, and the defendant was charged with a sum of \$3,000 interest upon the annual balances due after deducting expenditure. The court held, also, that the Belleville property had been sold owing to his negligence, and that he was bound to give its equivalent in money at the time of rendering the account. He was liable to pay \$15,000, also, as the value of the half of the Drummond street property, which by his wife's will he had been charged to deliver to the female plaintiff, in default of his delivering it over.

The court disallowed an item of \$2,026 charged among the expenses, being the amount of a judgment rendered in his favour on the cognovit of Mrs. Coleman, on the 21st May, 1853, on the ground that no sufficient evidence of a debt existed.

Other items of receipts were charged against him, including the \$3,000 for interest, and including, also, sums, as and for rents of the Belleville property from the year 1852, inclusive, making the total receipts \$52,500, from which an expenditure of \$11,222 was to be deducted, leaving the defendant responsible for \$41,278.

The Court of Queen's Bench held, that if there was anything in the objection that the action should have been brought in Ontario, it should have been urged as a plea to the jurisdiction of the court and not by an incidental demand, but in neither form would it be a valid objection, the action to account being a personal action which could be brought either at the domicile of the party accountable, or at the place where he was appointed to the office which makes him liable to account. The defendant had his domicile in Montreal, and was there appointed executor of Mrs. Coleman's will.

The defendant was relieved from an account for the rents of the Belleville property prior to 1855, on the ground that from the death of Mrs. Coleman in June, 1853, to 1855, Mullins alone administered that property, and executors are only responsible for what they have actually received, or ought to have received, and are not jointly and severally liable for each other's administration. The rents were also put at a much lower figure than that arrived at by the Superior Court.

Executors—Continued.

The appellant was allowed certain items which had been disallowed by the Superior Court, including the amount of the judgment for \$2,014.14, and he was allowed interest on the amount of this judgment and also on the debts which bore interest and which he paid in the interest of the minor and to prevent the sale of her real estate. He was also charged on account of the Belleville property with only \$6,250, the amount for which it was sold in 1870, the court considering that this was a fair price and that there was no evidence of fraud.

The result was that a balance of \$590.07, with interest from the 6th October, 1875, was found due to the defendant, and each party was ordered to pay his own costs of the court below, and the plaintiff to pay the defendant's costs of appeal. See 2 Dorion's Q. B. R. 33.

On appeal to the Supreme Court of Canada, **Held**, that the quality of the defendant was not only *res judicata* by the judgment condemning the defendant to render an account, but had been acquiesced in by the defendant; that the courts below were correct in holding that the action had properly been brought in the Province of Quebec; that, while agreeing with the Court of Queen's Bench as to the law respecting the liability of executors, the court was of opinion there was not sufficient evidence that Mullins had acted otherwise than as the agent of the defendant, who was therefore properly liable for all the rents of the Belleville property after the death of Mrs. Coleman; that the administration of the defendant, although begun before the promulgation of the Civil Code, should have been regulated by the principles contained in the Code, (Art. 290, *et seq.*) which, with a few exceptions introducing new law, are only a *resumé* of the old law on the obligations of a tutor. He should therefore have administered *en bon père de famille*, whereas his own evidence was sufficient to prove negligence on his part. He had allowed the tenants of the Belleville property to make only such repairs as they thought right, and moreover to deduct the cost from the rents, although the leases bound them to keep the property in repair. That the defendant should be charged interest on the price of the Belleville property (\$6,250), and also on that part of the price of the sale of the half of the Drummond street property unaccounted for (\$4,640), from the time of sale, (Art. 1,534, C.C.) not being entitled to the delay of six months allowed by the Code for investing the moneys of a minor, because he had claimed to appropriate and had used the money as his own; that the charge made for the board of Mrs. Coleman and Louisa, allowed by the Court of Queen's Bench, should be deducted, as Mrs. Coleman and her daughters were living with the defendant as his relatives, and there was no evidence that the defendant had at that time any intention of making them pay board; that the amount of the judgment obtained against Mrs. Coleman should be disallowed, together with the interest thereon; and that certain other items (particularly specified) should be disallowed. The result was that the judgment of the Queen's Bench was varied by condemning the defendant to pay to the plaintiffs the sum of \$12,121.49, but the court did not order a *contrainte par corps*, because it had been admitted that sufficient property belonging to the defendant to secure the plaintiffs had been seized, and because the court not being obliged to pronounce "*la contrainte par corps*"

Executors—Continued.

against tutors in every case, did not think it necessary to do so in the present one.

Per Strong, J.—The Belleville property having been devised by the plaintiff's father to her mother for life, with remainder to the plaintiff and her sister in fee, a trust was created, and upon the death of Mrs. Coleman there was no trustee to execute this trust, and Miller the defendant, and Mullins, having entered into the estate of the minors and taken the profits were accountable in equity as constructive trustees, and their liability in this respect being entirely a personal one might be enforced in a jurisdiction other than that in which the lands were situated, and the mere pending of a suit in the Ontario Court of Chancery, in which no decree had been made, did not constitute any ground of defence. The defendant ought not to be allowed to claim the amount of the judgment against Mrs. Coleman, because it was a failure of duty on his part not to see she was protected by accepting her mother's succession under benefit of inventory, and he cannot be allowed to take advantage of his own default by making the plaintiff responsible for her mother's debt to an amount far beyond the value of the succession. Besides, the evidence of a debt was very unsatisfactory, and it was the common practice (so much so that this court might take judicial notice of it) to take judgments in this form in Ontario for the sole purpose of enabling the lands to be sold under execution against the executor or administrator (*Gardiner v. Gardiner*, 2 U. C. O. S. 520), and not with any view of binding the executor to an admission of personal assets, and such a judgment was no evidence as regarded the real representatives of the heir or devisee, but as to them was *res inter alios*, and before lands could be made liable to the satisfaction of the judgment creditor he was bound to prove his original debt as strictly as if no judgment against the executor had ever been obtained, and this the defendant had entirely failed to do.

Appeal allowed with costs, and judgments of courts below varied.

Coleman v. Miller.—4th Dec., 1882.

5. *Executrix, removal of for wasteful and fraudulent administration—Husband of, may be general agent though will provides that he shall have no control of wife's interest—But not competent to give evidence on behalf of his wife.*

An action to set aside an executrix.

The appellant is the sole surviving executrix of the will of the late John Ross, and the appellant and the respondent are the remaining legatees under the will. The complaint of the respondent is:

1st. That appellant had given a power of attorney to her husband to manage the estate in violation of the terms of the will of the late John Ross.

2nd. Fraud in charging the estate with sums not legally chargeable to the estate. In charging a commission to remunerate her husband for the management of the estate, while paying one Tuggey a commission for the said services; in taking bonuses for leases granted, to wit, from Stearns and Murray, \$500,

Executors—Continued.

and from Hart and Tuckwell, \$500: in making a fraudulent lease to one Miss Cressy at a notoriously insufficient rent to the injury of the estate; in agreeing to pay \$1,200 to Hart and Tuckwell for the cancellation of the lease of part of the estate.

3rd. Waste in pulling down and erecting buildings on the estate.

The appellant denied all this waste and fraud, and maintained that she had a right to give her husband a power of attorney. The evidence is very voluminous.

With regard to the first point respondent relied on these words: "And it is furthermore my will and wish, that neither of the husbands of any of said daughters nor any of my daughters' future husbands, shall have any power over, control or interference in any manner, with the foregoing devise and bequest to them, but shall be as absolutely free from such power, control or interference, as if they had remained unmarried and single."

The appellant also complained that the testimony of her husband had been excluded, and that it was competent to the court to allow her husband to be examined. The appellant relied on Art. 252, C. C. P. and on 35 V. c. 6, s. 9.

The Superior Court (MacKay, J.), while admitting that under the will the husband could act as his wife's attorney, removed the appellant, on the grounds that the administration of the estate had been fraudulent and wasteful, that the lease to Miss Cressy had been imprudent and looked fraudulent, that in the receipt of bonuses by Dr. Thayer, husband of appellant, there had been fraud, for which the appellant was liable, and there had been other irregular transactions.

The Court of Queen's Bench held that it was competent to the appellant under the terms of the will to appoint her husband her general attorney and agent. That the judge of the court below not having permitted the introduction of Dr. Thayer's evidence, under the circumstances it would not be the duty of the court, even if it had the power, to send back the record to allow Dr. Thayer to be examined. That it would not feel disposed to set aside an executrix, daughter of the testator, herself a legatee, on the evidence of small payments, which might have been avoided. Nor did it think that the payment of a commission to Dr. Thayer for appreciable services, such as collections, would be ground for displacing the executrix selected by the testator. But that the judgment should be confirmed on account of the Cressy transaction, and the taking of bonuses on several occasions without accounting for them.

On appeal to the Supreme Court of Canada, Held, that the judgment of the court below must be confirmed on account of the Cressy transaction, and that the evidence of Dr. Thayer on behalf of his wife had been properly rejected.

Appeal dismissed with costs.

Ross v. Ross.—June 23rd, 1884.

6. Power to engage clerks—Art. 914, C. C. L. C.

See CONTRACT, 26.

Executors—Continued.**7. Administrator, acts of misconduct—Acting by agent—Next of kin—Costs charged against personally.**

The plaintiff wished to administer to the estate of his brother, in the county of Westmoreland, N.B., but was unable to give the necessary administration bond, until the defendant W. and one J. agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock, which the defendants wished to convert into money, but plaintiff would not assist them in doing so.

In passing the accounts of the estate in the Probate Court of Westmoreland County, it was found that there were several persons entitled to participate as next of kin of the deceased, and the respective amounts due the several claimants were settled by the court.

Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally plaintiff filed a bill to compel the defendants to pay him his portion of the estate with \$1,000, which he claimed as commission, and also to hand over to him the shares of the next of kin. After the hearing a decree was made directing that the estate be disposed of by the defendants, and that they were entitled to their costs as between solicitor and client, which could be retained out of the plaintiff's share of the estate.

On appeal, Proudfoot, J., reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendants costs, but the Court of Appeal restored the original judgment.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Appeal, (10 Ont. App. R. 76), that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other next of kin to bear the burden of the costs.

O'Sullivan v. Harty, 22 C. L. J. 17.—November 16th, 1885.—xi. 322.

8. Sale of land by—Unknown quantity—Sold by the acre—More or less.

See **SALE OF LANDS**, 22.

9. Death of party after verdict and before judgment on a rule for a new trial—Suggestion of death filed—Judgment *nunc pro tunc*—Appeal by Executors.

See **APPEAL**, 18.

10. Removal of executor—Arts. 282, 285, 917, C. C.

Held, affirming the judgment of the Queen's Bench for Lower Canada (appeal side) M.L.R. 3 Q.B. 191, that Art. 282, C.C. does not apply to executors chosen by the testator, and that in an action for the removal of one executor

Executors—Continued.

when there are several executors, the existence of a law-suit between such executor and the estate he represents, and the evidence of irregularities in his administration but not exhibiting any incapacity or dishonesty, are not a sufficient cause for his removal. Arts. 285, 917, C. C. Strong, J., dissenting.

Present :—Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Mitchell v. Mitchell.—April 30, 1889.—xvi. 722.

11. *Testamentary executor—Liability for misappropriation by agent—Art. 1711, C. C.*

Held, affirming the judgments of the courts below, that when a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters entrusted to him and to take all due precautions and cannot escape liability for the misappropriation of funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation.

Low v. Gemley.—xviii. 685.

12. Judgment against executors on note made by one of the executors endorsed by testator—Sale of lands by sheriff and purchase thereof by executors—Possession taken forcibly by devisee—Trust—Statute of limitations.

See TRUSTS AND TRUSTEES, 24.

13. *Executor—Action against—Legacy—Trust—Claim on assets—Charge on realty.*

T. H. and his brother were partners in business and the latter having died T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having encumbered both his own share of the property and that devised to him, one of his creditors, and a mortgagee of the property, obtained judgment against him and procured the appointment of receivers of his estate. E. H. then brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the moneys in the receivers' hands in priority to the personal creditors of T. H.

Held, affirming the judgment of the court below, that it having been established that the moneys held by the receivers were personal assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment though his judgment was registered after those of the other creditors.

Held, also, that the legacy of E. H. was a charge upon the realty of the testator the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and the words "property" and "estate" being both sufficient to pass realty. This charge upon realty operated against the mortgagees, who were shown to have had notice of the will.

Cameron v. Harper.—xxi. 273.

Expert—Builder's Privilege—Duties of expert—Procès verbal—
Arts. 1695, 2013, 2103, C. C.—Art. 333, *et seq.*, C. C. P.

See BUILDER'S PRIVILEGE.

Explosion—Of gunpowder—Damage caused by—Whether within
policy.

See INSURANCE, FIRE, 17.

Expropriation—By road trustees.

See ROAD.

2. By-law guaranteeing cost of, invalid.

See RAILWAYS AND RAILWAY COMPANIES, 18.

3. Public highway—Statute authorizing expropriation of, for public
purposes—Records containing proceedings on, loss of—Pre-
sumption.

See HIGHWAY, 2.

4. Award—Validity of—Description of land—43-44 V. c. 43 s. 9,
(P.Q.)—*Faits et articles*—Art. 225, C. C. P.

See ARBITRATION AND AWARD, 15.

5. Of land for railway purposes—Order by judge in chambers as
to money deposited—S. & E. C. Act (R. S. C. c. 135), s. 28-43
V. c. 9, s. 9, s-s. 31 —*Persona designata*—Abandonment of
notice—R. S. C. c. 109, s. 8, s-s. 26 & 34.

See RAILWAYS AND RAILWAY COMPANIES 44.

also JURISDICTION, 62.

6. Of land for railway purposes—Award of official arbitrators—
Compensation—Value necessarily largely speculative—Duty
of Appellate Court.

See ARBITRATION AND AWARD, 17.

7. Of land for railway purposes—Award increased by Exchequer
Court—Hearing of additional witnesses—Appreciation of
evidence—Appeal.

See ARBITRATION AND AWARD, 18.

Expropriation—Continued.

8. *Expropriation of land—Railway Company—Damages, estimation of—R. S. C. c. 39, s. 3, s-s. (e)—Farm crossings—R. S. C. c. 38, s. 16.*

Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel.

The compensation to be paid for any damages sustained by reason of anything done under and by authority of R. S. C. c. 39, s. 3, s-s. (e), or any other Act respecting public works or government railways, includes damages resulting to the land from the operation as well as from the construction of the railway.

The right to have a farm crossing over one of the government railways is not a statutory right, and in awarding damages full compensation for the future as well as for the past for the want of a farm crossing should be granted.

Gwynne, J., dissenting, was of opinion that the owner had the option of demanding, and the government had a like option of giving, a crossing in lieu of compensation, and that on the whole case full compensation had been awarded by the court below. (See now 54 V. c. 38, s. 3).

Yezina v. The Queen.—xvii. 1.

9. *Expropriation for government railway purposes—Severance of land—Farm crossings—Compensation.*

When land expropriated for government railway purposes severed a farm the owner, although not at the time entitled to a farm crossing apart from contract, was entitled to full compensation covering the future as well as the past for the depreciation of his land by want of such a crossing. Gwynne, J., dissenting on the ground that the owner was entitled to a crossing as a matter of law. (See now 52 V. c. 38, s. 3).

Guay v. The Queen.—xvii. 30.

10. *Expropriation for railway purposes—Award—Validity of—Riparian rights—Obstruction to access et sortie—Right of action.*

In an award for land expropriated for railway purposes where there is an adequate and sufficient description, with convenient certainty of the land intended to be valued, and of the land actually valued, such award cannot afterwards be set aside on the ground that there is a variation between the description of the land in the notice of expropriation and in the award.

A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *accès et sortie*, and such obstruction without parliamentary authority is an actionable wrong: *Pion v. North Shore Railway Co.*, (14 App. Cas. 612) followed.

Expropriation—Continued.

Taschereau, J., was of opinion that the award in this case included compensation for the beach lying in front of plaintiff's property, which belongs to the Crown, and, for that reason, should be set aside.

Bigaouette v. North Shore Railway Co.—xvii. 363.

11. Railway Company—Expropriation of land—Description in map or plan filed—Deviation—42 V. c. 9, s. 8, s-s. 11 (D.).

See RAILWAYS AND RAILWAY COMPANIES, 54.

12. *Contract to build Government Railway—Government Railway Act, 44 V. c. 25, s. 109 — Construction of term "employee"—Conditions precedent to exercise of compulsory powers of expropriation—Notice of action.*

Held, that the compulsory powers given to the Government of Canada to expropriate lands required for any public work can only be exercised after compliance with the statute requiring the land to be set out by metes and bounds and a plan or description filed; if these provisions are not complied with, and there is no order in council authorizing land to be taken when an order in council is necessary, a contractor with the crown who enters upon the land to construct such public work thereon is liable to the owner in trespass for such entry.

Kearney v. Oakes.—xviii. 148.

And see NOTICE, 13.

13. *Expropriation—Prospective capabilities of property—Value to owner—Unity of possession—Advantage accruing to paper town from railway.*

Appeal and cross-appeal from the judgment of the Exchequer Court on a claim arising out of an expropriation of land at Port Hawkesbury, N.S., for the purposes of the Cape Breton railway. The amount awarded to the claimant was \$9,223.50, and the Exchequer Court judgment which is reported at length in 2 Ex. C. R. 149, was unanimously affirmed by the Supreme Court.

Present: Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Paint v. The Queen.—June 17, 1891.—xviii. 718.

14. For railway purposes—Arbitration—R. S. Q., Art. 5164—Lands injuriously affected.

See ARBITRATION AND AWARD, 25.

15. Arbitration and award—Expropriation under Railway Act—R. S. C. c. 109, s. 8, s-s. 20 & 21.—Discretion of arbitrators—Amount of award.

See ARBITRATION AND AWARD, 16.

Expropriation—Continued.**16. Municipal corporation—Alteration of street—Lowering grade—Excavation—Injury to adjacent land—Subsidence of soil.**

See MUNICIPAL CORPORATION, 21.

17. *Expropriation of land for railway purposes—Value of land for building purposes—Damages resulting from want of crossing.*

The crown had expropriated a certain portion of land which the claimant contended was held for sale as building lots. It was established in evidence that such land had not been laid off into lots prior to the expropriation, and that none of it had therefore been sold for building purposes. There was evidence, however, to show that there was a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town.

By the absence of a crossing over the railway, claimant was deprived of access to the shore, and thereby suffered loss in the use and occupation of the property remaining to her.

Held, per Burbidge, J. in the Exchequer Court of Canada, see 2 Ex. C. Rep. 21, that while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation.

Held, also, that claimant was entitled to compensation in respect of the damage resulting from the want of a crossing.

On appeal by the claimant to the Supreme Court of Canada, **Held,** that the amount of compensation awarded should be increased, on the ground that it did not appear that such compensation was assessed in view of the future damage that might result from the want of a crossing.

Present: Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Kearney v. The Queen.—30th April, 1889.

18. *Value of land taken—Award by Exchequer Court judge—Appeal.*

Appeal from a decision of the Exchequer Court of Canada assessing the compensation to be paid to appellants for lands taken at Levis for use of Intercolonial Railway.

Held, that the court will not interfere with the award of the judge of the Exchequer Court as to the value of land expropriated for railway purposes where there is evidence to support his finding and such finding is not clearly erroneous.

Corporation of the town of Levis v. The Queen.—xxi. 31.

Expropriation—Continued.**19. Award—Setting aside.**

On the 3rd of February, 1882, Her Majesty represented by the minister of railways and canals, requiring a portion of a lot belonging to the respondents, for the construction of the St. Charles Branch of the Intercolonial Railway deposited in the proper registry office, in accordance with section 10 of the Government Railway Act, 1881, a plan of the land so required, and gave notice under section 15 of said Act tendering the sum of \$2,662.42 as compensation for the land expropriated.

The lot in question had been used as a cove, and although the cove was not a large one, a profitable lumber business had been conducted thereon. To enable such a business to be carried on advantageously, a valuable wharf was erected running into deep water, at which vessels of large size could load.

The dimensions of this wharf were 6,886 cubic yards.

The portion of the said lot so taken was a width of 25 feet through almost the middle of it and across the wharf by 211 feet, or in all 5,156 square feet of beach; the portion of the wharf thereon expropriated constituted 1,000 square feet.

Upon the said respondents refusing to accept the sum tendered, the question of the value to be paid by Her Majesty for the land so expropriated, was submitted by the said the minister of railways and canals, under the provisions of the government railways Act, 1881, to the board of official arbitrators of Canada for their investigation and award.

The said board of arbitrators, after hearing evidence upon the part of the claimants and the crown, awarded the claimants the amount which had been tendered and refused as full compensation for the land expropriated, and all damage to the balance of the property, and imposed the costs of the arbitration upon the claimants.

The respondents thereupon appealed to the Exchequer Court and Mr. Justice Fournier, who heard the said appeal, and before whom one witness on either side was examined, set aside the award of the arbitrators and allowed the claimants \$11,073 (being \$8,500 as damages suffered by the property through the construction of the road through it, and \$2,573 as the value of the land expropriated) as the amount which the arbitrators should have awarded them. He also allowed the claimants the costs of the appeal (save of their witnesses examined in the Exchequer Court) and before the arbitrators.

From this judgment Her Majesty appealed to the Supreme Court, and the respondents gave notice to Her Majesty's Attorney General of their intention upon the hearing of the appeal to contend that the decision of the court below should be varied and that the respondents were entitled to a larger sum as compensation and damages.

The questions before the court were entirely those of fact, and it was Held, that the judgment of the court below should be affirmed and the appeal dismissed with costs.

Present :—Ritchie, C.J., and Fournier, Henry, Taschereau and Gwynne, JJ.

The Queen v. Murphy.—9th April, 1886.

Extradition—Trial for offence other than that for which prisoner extradited.

See CRIMINAL APPEAL, 6.

Extra work—Claim for.

See PETITION OF RIGHT, 1, 2, 8.

F.

False Imprisonment.

See ASSESSMENT AND TAXES, 3.

False Pretences—Obtaining money by—Delegation of authority by Attorney-General.

See CRIMINAL APPEAL, 1.

Farm Crossings—Obligation of railway company as to.

See RAILWAYS AND RAILWAY COMPANIES, 29, 30.
EXPROPRIATION, 8, 9.

Fees—Action by counsel to recover.

See PETITION OF RIGHT, 5.
COSTS.

Felony—Compounding—Embezzlement of bank funds by agent—Security to bank—Bond—Consideration—Agreement not to prosecute.

See CONTRACT, 57.

2. Notarial Code—R. S. Q. Art. 3871—Board of notaries—Disciplinary powers in case of felony.

See NOTARY, 4.

Ferry.—*License to—Construction of—Disturbance of.*

The Crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville to Ameliasburg."

Held: A sufficient grant of a right of ferriage to and from the two places named.

Ferry—Continued.

Under the authority of this license the town of Belleville executed a lease to the plaintiff granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side, and a ferry was established within the limits of the town of Belleville on the one side, to a point across the Bay of Quinte, in the township of Ameliasburg, within an extension of the east and west limits of Belleville. The defendants established another ferry across another part of the Bay of Quinte, between the township of Ameliasburg and a place in the township of Sidney, which adjoins the city of Belleville, the termini being on the one side two miles from the western limits of Belleville, and on the Ameliasburg shore about two miles west from the landing place of the plaintiff's ferry.

Held, reversing the judgment appealed from, that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the said ferry, and that the defendants' ferry was no infringement of the plaintiff's right.

Anderson v. Jellet.—ix. 1.

2. Railway ferry—Accident at—Caused by want of reasonable precautions.

See RAILWAYS AND RAILWAY COMPANIES, 26.

3. Under control of corporation—Negligence in mooring—Liability for injury to passenger.

See MUNICIPAL CORPORATION, 7.

4. Taxation of ferry boats—Jurisdiction of harbour commissioners, Montreal—39 V. c. 52 (P.Q.) constitutional—By-law *ultra vires* as going beyond provisions of statute.

See LEGISLATION, 15.

5. Toll bridge—38 V. c. 97—Interference—Damages.

By 38 V. c. 97, the plaintiffs were authorized to build and maintain a toll bridge on the River L'Assomption at a place called "Portage," and if the said bridge should by accident or otherwise be destroyed, become unsafe or impassable, the said plaintiffs were bound to rebuild the said bridge within fifteen months next following the giving way of said bridge, under penalty of forfeiture of the advantages to them by this Act granted; and during any time that the said bridge should be unsafe or impassable they were bound to maintain a ferry across the said river, for which they might recover the tolls. The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although plaintiffs maintained a ferry across the river, the defendant built a temporary bridge within the limits of the plaintiffs' franchise and allowed it to be used by parties crossing

Ferry—Continued.

the river. In an action brought by the plaintiffs, claiming \$1,000 damages, and praying that defendant be condemned to demolish the temporary bridge, on an appeal to the Supreme Court it was Held, reversing the judgment of the court below, Ritchie, C.J. and Patterson, J., dissenting, that the exclusive statutory privilege extended to the ferry, and while maintained by the plaintiffs the defendant had no right to build the temporary bridge, but as the bridge had since been demolished the court would merely award nominal damages and costs.

Galarneau v. Gullbault.—xvi. 579.

Final Judgment.—

See APPEAL.

JUDGMENT.

JURISDICTION, 7, 11, 15, 21, 52, 53, 67, 69, 71, 77, 79, 80, 81, 89, 91, 100, 101, 102, 104, 107, 108.

LEGISLATURE, 4.

MANDAMUS, 11.

Fire.—

See NEGLIGENCE, 81.

Fisheries—Regulation and protection of.

See PETITION OF RIGHT, 4.

2. Fishery officer, right of, to seize on view.

See PARLIAMENT OF CANADA, 4.

3. Fishery officer—Trespass—31 V. c. 60, ss. 2, 19 (D.)—Order in council, 11th June, 1879, construction of—Notice not necessary—Damages, excessive.

Three several actions for trespass and assault were brought by A., B. and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V., for forcibly seizing and taking away their fishing-rods and lines, while they were engaged in fly-fishing for salmon in front of their respective lots. The defendant was a fishery officer, appointed under the Fisheries Act, 31 V. c. 60, and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an Order in Council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in these words:—"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited." The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance had been made. There was no actual injury. A. recovered \$3,000, afterwards reduced to \$1,500, damages; B., \$1,200; and C., \$1,000. *See* 22 N. B. 639.

Fisheries—Continued.

Held, that sections 2 & 19 of the Fisheries Act, and the Order in Council of the 11th of June, 1879, did not authorize the defendant, in his capacity of inspector of fisheries, to interfere with A., B. and C.'s exclusive right as riparian proprietors of fishing at the *locus in quo*; but that the damages were in all the cases excessive, and therefore new trials should be granted.

Held also, Gwynne, J., dissenting, that when the defendant committed the trespasses complained of, he was acting as a Dominion officer, under the instructions of the Department of Marine and Fisheries, and was not entitled to notice of action under C. S. N. B. c. 89, s. 1, or c. 90. s. 8.

Yenning v. Steadman.—ix. 206.

Force Majeure—Plea of—Fall of wall after fire—Want of precautions to prevent—Art. 17, ss. 24, 1053, 1055, 1071, C. C.

See NEGLIGENCE, 81.

Foreign Bankruptcy.

See INSOLVENCY, 2.

Foreign Company—Winding up of.

See CORPORATIONS, 12.

Foreign Corporation.

See ASSESSMENT AND TAXES, 6.

Forgery.

See CRIMINAL APPEAL, 6.

2. Bank taking forged paper in renewal of notes—Release of surety.

See BANKS AND BANKING, 15.

3. *Forgery—Ratification—Estoppel.*

Y., who had been in partnership with the defendants, trading under the name of the H. C. Company, but had retired from the firm and become the general manager of the company, but with no power to sign drafts, drew a bill of exchange for his own private purposes in the name of the defendants on a firm in Montreal, which was discounted by the plaintiff bank. Before the bill matured, Y. wrote to defendants informing them of having used their name, but that they would not have to pay the draft. The bill purported to be indorsed by the company *per* J. M. Y. (one of the defendants), and the other defendant having seen it in the bank examined it carefully, and remarked that "J. M. Y.'s signature was not usually so shaky." J. M. Y. afterwards called at the bank and examined the bill very carefully, and in answer to a request from the manager for a cheque he said that it was too late that day but he would send a cheque the day following. No cheque was sent, and a few days before the bill matured the manager and solicitor of the bank called

Forgery—Continued.

to see J. M. Y., and asked why he had not sent the cheque. He admitted that he had promised to do so and at the time he thought he would. Y. afterwards left the country, and in an action against the defendants on the bill they pleaded that the signature of J. M. Y. was forged, and on the trial the jury found that it was forged and judgment was given for the defendants.

Held, affirming the decision of the Court of Appeal for Ontario, 15 Ont. App. R. 573, which reversed that of the Divisional Court, 13 O. R. 520, that though fraud or breach of trust may be ratified forgery cannot, and the bank could not recover on the forged bill against the defendants. *La Banque Jacques Cartier v. La Banque d'Epargne*, 13 App. Cas. 118, and *Barton v. London and North-Western Railway Company*, 6 L. T. Rep. 70, followed.

Present:—Sir W. J. Ritchie, C J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Merchants' Bank of Canada v. Lucas.—Mar. 10, 1890—xviii. 704.

4. Evidence as to signature on note—Belief as to genuineness of signature—Conversation partly given on examination in chief—Cross-examination—Order for new trial reversed.

See EVIDENCE, 50.

Form—Statutory — Departure from — Assessment of railway company—53 V. c. 27, s. 125 (N.B.)

See ASSESSMENT AND TAXES, 26.

2. Statutory—Departure from—Assessment of insurance company —53 V. c. 27, s. 125 (N.B.)

See ASSESSMENT AND TAXES, 27.

Fraud—Rescission of contract for.

See SALE OF LANDS, 8, 14, 27.

Fraudulent Misrepresentation.

See MISREPRESENTATION.

Fraudulent Preference—Assignment for benefit of creditors — Power to sell on credit—R. S. O. c. 118, s. 2.

In a deed of assignment for the benefit of creditors, the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, etc., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall

Fraudulent Preference—Continued.

deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown.

Held, affirming the judgment of the court below, that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act, R. S. O. c. 118, s. 2.

Slater v. Badenach.—x. 296.

2. Judgment in default of appearance—Facilitating recovery of—Not a fraudulent preference under R. S. O. c. 118—Premature issue of writs of execution—Irregularity and not a nullity—Ont. Jud. Act, 1883.

On the 28th March, 1882, a writ was issued by C. *et al.* (respondents) against one M., for the recovery of the sum of \$32,155.83, and said writ was duly endorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the respondents for the said sum of \$32,155.83 on an account previously stated and settled between C. *et al.* and M., such amount being arrived at by allowing to M. a discount of 5 per cent. for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. *et al.* (appellants), creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued.

The stock-in-trade was sold by the sheriff at public action, under all the executions in his hands, to the respondents, who were the highest bidders.

On a trial in an interpleader issue, to try whether appellants' execution against M. was entitled to priority over that of respondents, and whether the judgment of the latter was void for fraud, and as being a preference; and whether respondents' executions were void as against appellant's execution, on account of their having issued them before the expiration of eight days from the last day for appearance, Mr. Justice Armour directed a verdict or judgment to be entered in favour of the appellants. That judgment was reversed by the Queen's Bench Division of the High Court of Justice for Ontario, whose judgment was affirmed by the Court of Appeal for Ontario.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Appeal, that what the debtor did in this case did not constitute a fraudulent preference prohibited by R. S. O. c. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity.

Macdonald v. Crombie.—xi. 107.

3. Assignment for benefit of creditors—Accidental omission of claim from Schedule of debts—R. S. O. c. 118, s. 2.

An insolvent made an assignment for the benefit of his creditors. The deed purported to be for the purpose of satisfying, without preference or

Fraudulent Preference—Continued.

priority, all the creditors of the insolvent, and the trust was declared to be :
 1. To pay in full the debts of the several persons or firms named in a schedule to said deed, or, if not sufficient to pay the same in full, to divide the assets of the insolvent estate *pro rata* among such scheduled creditors, and : 2. To pay the surplus, if any, to the said insolvent. It appeared that there was a small creditor of the insolvent whose name was not on said schedule.

Held, per Ritchie, C.J., and Fournier and Taschereau, JJ., reversing the judgment of the court below, Henry, J., dissenting, that the consideration for the deed, as expressed on its face, was that there should be a distribution of the estate of the insolvent among all his creditors, and the assignee was not bound to confine such distribution to the creditors named in the schedule.

Per Strong, J.—That the assignee was confined to the schedule but effect must be given to the word "intent" in the statute, and as the evidence showed that a *bona fide* effort was made to ascertain the names of all the creditors before the execution of the deed it did not appear that the insolvent intended to prefer the scheduled creditors, and the deed, therefore, was not void under R. S. O. c. 118, s. 2.

Semble, per Strong, J.—That the word "preference" in R. S. O. c. 118, s. 2, imports a "voluntary preference" and is not applicable to the case of a deed obtained by a creditor or creditors, who to obtain it have brought pressure to bear on the debtor.

McLean v. Garland.—xiii. 866.

4. *Interpleader issue—Insolvent company—Chattel mortgage—Preference over other creditors—Intention to prefer—R. S. O. c. 118.*

The Hamilton Knitting Company, being indebted in a large amount to the appellants, and believing that their charter did not permit them to give a mortgage on their property to secure an overdue debt, agreed to give such mortgage in consideration of an advance by appellants of more than the amount of the debt, the actual amount to be returned to the mortgagees. This arrangement was carried out, and the balance of the amount advanced on the mortgage, after paying the debt, was put into the business of the company.

At the time this was done the company believed that by getting time from these creditors they would be able to carry on their business and avoid failure. This hope was not realized, however, and they shortly after stopped payment, and, in consequence, certain of their creditors, the above respondents, obtained judgments on their respective claims and issued executions. The property secured by the said chattel mortgage was seized under these executions, and this interpleader issue was brought to test the title to such property.

The learned chancellor, before whom the issue was tried, gave judgment for the execution creditors, holding the mortgage void under the statute relating to fraudulent preferences, R. S. O. c. 118, and the Court of Appeal sustained this judgment by an equal division of the court. 12 Ont. App. R. 187.

Fraudulent Preference—Continued.

On appeal to the Supreme Court of Canada, **Held**, that as the company *bona fide* believed that by getting an extension of time from the appellants, they would be able to continue their business, it could not have been given with a view of preferring the appellants and of defrauding the other creditors, and therefore the appellants were entitled to judgment.

Long, et al. v Hancock, 22 C. L. J. 16.—16th November, 1885—xii. 532.

5. Chattel mortgage, fraudulent against creditors—Assignment in trust by mortgagor—Mortgagees not parties as plaintiffs—Trust deed not attacked—Mortgage void under the statute.

See CHATTEL MORTGAGE, 7.

6. *Capias*—Petition to be discharged—Judgment on—Appealable under s. 28 of c. 135, R.S.C.—Arts. 819-821, C.C.P.—Fraudulent preference—Secrecy—Art. 798, C.C.P.—Promissory note discounted—Arts. 1036-1953, C.C.P. (P.Q.)

A writ of *capias* having been issued against McK. under the provisions of Art. 798 of C. C. P. (P.Q.) he petitioned to be discharged under Art. 819, C. C. P., and issue having been joined on the pleadings under Art. 820, C. C. P., the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench for Lower Canada (appeal side) and that court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court of Canada. On motion to quash for want of jurisdiction,

Held, that the judgment was a final judgment in a judicial proceeding within the meaning of s. 28, c. 135, R. S. C. and therefore appealable—Taschereau, J., dissenting. *Stanton v. Canada Atlantic Ry. Co. (Cassels' Dig. "Jurisdiction" 37)* reviewed. On the merits it was:

Held, per Ritchie, C.J., Fournier and Taschereau, JJ., that a fraudulent preference to one or more creditors is a secretion within the meaning of Art. 798, C. C. P. Also, that an endorser of a note discounted by a bank has the right under Art. 1953, C. C. to avail himself of the remedy provided by Art. 798, C. C. P. if the maker fraudulently disposes of his property. Strong, Henry, and Gwynne, JJ., *contra.*—The court being equally divided the appeal was dismissed without costs.

Mackinnon v. Kercock.—xv. 111.

7. Assignment in trust for creditors—Unpreferred creditors—Unreasonable provision for—Resulting trust—13 Eliz. c. 5.

See ASSIGNMENT, 12.

8. Assignment for benefit of creditors—R. S. O. c. 118—48 V. c. 26, s. 2 (O.)—Insolvency—Book debts.

See ASSIGNMENT, 17.

Fraudulent Preference—Continued.**9. Debtor and creditor—Composition—Loan to effect payment—Failure to pay—Secret agreement—Mortgage—Avoidance of—Arts. 1083, 1039 & 1040, C.C.**

On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at 4, 8 and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of \$14,000. B. *et al.*, the appellants, were at that time accommodation endorers for \$7,415 of that amount, but held as security a mortgage dated the 5th September, 1881, on L.'s real estate. The bank having agreed to accept \$8,000 cash for its claim B. *et al.* on the 8th January, 1884, advanced \$3,000 to L. and took his promissory notes and a new mortgage registered on the 13th of January for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, the respondents, who on the 14th of January, 1884, advanced a sum of \$3,000 to L. to enable him to pay off the Exchange Bank and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D. *et al.*, who were not originally parties to the deed of composition, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.

Held, reversing the judgments of the Superior Court for L. C. and the Court of Q. B. for L. C. (appeal side), that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. Ritchie, C.J., and Taschereau, J., dissenting.

Per Fournier, J.—The mortgage having been registered on the 13th of January, 1884, the respondent's right of action to set aside the mortgage was prescribed by one year from that date: Art. 1040, C.C.

Brossard v. Dupras.—xix. 531.

10. Hypothec to the prejudice of creditors—Notorious insolvency of mortgagors—Art. 2023, C. C.

See INSOLVENCY, 30.

11. Deed of sale—Insolvency of vendor—Evidence.

See INSOLVENCY, 31.

12. Pledge of railway property to secure disbursements—Void as against creditors—Art. 419, C. C.

See PLEDGE, 5.

Fraudulent Preference—Continued.

13. Insolvency, knowledge of by creditor—Pledge—Warehouse receipts—Novation—Arts. 1975, 1034, 1035, 1036, 1169, C. C.

See INSOLVENCY, 32.

14. Chattel mortgage—*Bona fide* advance—Consideration partly bad—Effect on whole instrument—R. S. O. 1887, c. 124, s. 2.

See CHATTEL MORTGAGE, 18.
INSOLVENCY, 1, 6, 13.
PREFERENCE.

- Fund**—Distribution of—Diocesan Church Society—Conditions as to participation.

See DIOCESAN FUND.

G.

- Garnishee**—Equitable assignment—Representation of indebtedness—Estoppel.

See ESTOPPEL, 4.

2. Payment by, of an over-due note—Garnishee clauses, C. L. P. Act.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

Gift.

See DONATION.

Goods—Sales of.

See SALE OF GOODS.

- Goodwill**—Partnership—Terms of—Expulsion of one partner—Forfeiture of share of goodwill—Notice—Waiver.

See PARTNERSHIP, 14.

- Great Seal**—Of the Province of Nova Scotia.

See LEGISLATURE, 4.

Guarantee—Letter of guarantee by bank—Claim for loss—Proof of claim—Account sales.

H. et al. upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. S. with guarantee against loss shipped three days after the suspension of the bank some cattle and consigned them to their own agents at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of \$7,965 on the shipments, and the claim being contested the only witness they adduced at the trial was one of their employees who knew nothing personally about what the cattle realized, but put in account sales received by mail as evidence of loss.

Held, affirming the judgment of the court of Queen's Bench for Lower Canada, that assuming that there was a valid guarantee given by the bank, upon which the court did not express any opinion, the evidence as to the alleged loss was insufficient to entitle *H. et al.* to recover.

Per Taschereau, J.—That the guarantee was subjected to a delivery of the cattle to M. S. and that *H. et al.* having shipped the cattle in their own name could not recover on the guarantee.

Hathaway v. Chaplin.—xxi. 23.

2. Guarantee by managing owner of bills drawn by master of ship on agents—Consideration, delay—Misrepresentation—Not available under plea of fraud.

See SHIPS AND SHIPPING, 14.

H.

Habeas Corpus.—Conviction for violation of license laws—Prisoner discharged before appeal—No jurisdiction.

See JURISDICTION, 24.

2. *In criminal matters—No appeal in from any court to Supreme Court of Canada—Section 51, S. C. Act—Jurisdiction—Court of Appeal of Ontario, adjudication by in Hab. Corp. matter—Production of prisoner on return of writ—Application to give short notice of hearing not entertained when ex parte—32 & 33 V. c. 32, s. 19—38 V. c. 47—Intra Vires of Dom. Parliament—Summary trial by police magistrate.*

On the 16th January, 1879, the prisoner was charged for that he did "unlawfully and maliciously cut and wound one Mary Kelly with intent then and there to do her the said Mary Kelly grievous bodily harm," and being tried

Habeas Corpus—Continued.

summarily before the police magistrate of the city of Ottawa was found guilty, and sentenced to be imprisoned in the Central Prison for the province of Ontario at Toronto, and there to be kept at hard labour for one year.

On being brought before the Court of Queen's Bench for Ontario upon a writ of *habeas corpus* issued from that court, the prisoner was remanded back to prison; whereupon the prisoner appealed to the Court of Appeal for Ontario; which court dismissed his appeal on the 20th May, 1879. See 8 Ont. Pr. R. 20.

Notice was given of an intention to appeal from this judgment to the Supreme Court of Canada, and the case in appeal was received towards the end of May, too late to be set down for hearing at the then sessions of the Supreme Court, whereupon application was made to Mr. Justice Fournier for leave to bring the appeal on for hearing and to give short notice of hearing. This leave was refused, on the ground that no appeal would lie in such a case to the Supreme Court of Canada.

An application was then made on behalf of the prisoner for a writ of *habeas corpus* to Mr. Justice Gwynne of the Supreme Court of Canada, who

Held, that the application should be refused for two reasons: 1st. The applicant was convicted of an offence, being a misdemeanor as stated sufficiently in the conviction, which could not be avoided for matter of form; the misdemeanor of which he was so convicted was an offence cognizable by the Court of General Sessions of the Peace, and for such offence the statute of 1875 authorized a punishment to be inflicted such as the Court of General Sessions could award for the like offence, and the punishment awarded was such as the Court of General Sessions might have awarded. 2ndly. The decision of the Court of Appeal should be considered conclusive, and should not be interfered with by a single judge of any court sitting in chambers, but the applicant must be left to any recourse he might have against the adjudication of the Court of Appeal for Ontario. June 19th, 1879.

On the 23rd June an application for a writ of *habeas corpus* was made on behalf of the prisoner to Mr. Justice Henry, of the Supreme Court of Canada, who granted an order for a writ, returnable before the Chief Justice or any judge of said court in chambers, such order providing that, counsel for the prisoner consenting, the actual presence of the prisoner should be dispensed with, and providing, also, for service of the order on the Attorney General of the Province, or his deputy, or his agent at Ottawa. The writ was returned before Chief Justice Ritchie in chambers on the 5th July, 1879.

Held, by the Chief Justice, that he thought he should not deal with the matter without the prisoner being brought before him according to the exigency of the writ, but he was also of opinion that the prisoner should not be discharged on *habeas corpus*; and he therefore refused the application for his discharge.

On the 18th September, 1879, another application was made to Mr. Justice Henry in Chambers, who granted an order for the writ, returnable before himself in chambers, dispensing with the actual presence of the prisoner on the return of the writ (counsel for the prisoner consenting), and providing for service of the order on the Attorney-General of the Province.

Habeas Corpus—Continued.

On the 1st October, 1879, upon the return of the writ, after hearing counsel for the prisoner and the Attorney-General, Mr. Justice Henry

Held, 1st. That the police magistrate derived his power to try the prisoner as he did from the 38th V. c. 47, but reference to 32 & 33 V. c. 32 was necessary to decide upon the nature of the charge and the conviction, In the information the prisoner was charged in the very words of the first clause of s. 19 of 32 & 33 V. c. 32, and the punishment awarded was that warranted by the terms of the enactment, and the additional words as to the intent should be considered nothing more than surplusage.

2nd. That 38th V. c. 47, giving power to police and stipendiary magistrates to try in a summary manner felonies and misdemeanors, was *intra vires* of the Dominion Parliament.

3rd. That it was unnecessary to consider the point whether the prisoner should be brought before him according to the exigency of the writ, no objection having been taken, and his judgment being unfavorable to the prisoner on the other grounds.

Application to discharge the prisoner refused.

Application was then made to Mr. Justice Fournier in chambers for leave to bring the appeal on for hearing at the next session of the Supreme Court of Canada, and to serve short notice of hearing, but it was **Held**, that sufficient grounds were not shown to take the case out of the regular course of procedure.

On the 10th November, 1879, the application was renewed before the full court, but being made *ex parte* and without notice the court refused to hear it.

On the 15th November, 1879, the application was again made to the full court, when the Attorney-General of Ontario showed cause, and it was

Held, that no appeal would lie in such a case to the Supreme Court of Canada, but even if it did, under all the circumstances and delays that had occurred, the court should not go out of its way to exercise any discretion as to granting leave.

Per Ritchie, C.J.—As regards *habeas corpus* in criminal matters, the court has only a concurrent jurisdiction with the judges of the Superior Courts of the various provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any judge or court, or any Appellate Court, because the prisoner can come direct to any judge of the Supreme Court individually, and upon that judge refusing the writ or remanding the prisoner, he could take his appeal from that judgment to the full court.

Motion refused.

In re Boucher.—15th November, 1879.

3. In a case of commitment by a coroner for murder, application was made to Strong, J., for a writ of *habeas corpus*.

Held, that under s. 51, S. C. A., the writ is to be issued for the purpose of an enquiry into a commitment only "in any criminal case under any Act of the Parliament of Canada," and the Act of the Parliament of Canada (1869)

Habeas Corpus—Continued.

does not create the offence of murder, but only defines the punishment which may be awarded for such offence. Writ refused.

In re Pierre Poitvin.—August, 1881.

4. *Conviction before magistrate—Arrest on warrant under—Inquiry as to evidence—Jurisdiction of court on certiorari—S. & E. C. A., s. 49—S. C. Am. Act, 1876, s. 34—R. S. O. c. 70.*

Application was made to the chief justice in chambers on behalf of a person arrested on a warrant, issued on a conviction by a magistrate, for a writ of *habeas corpus*, and for a *certiorari* to bring up the proceedings before the magistrate, the application being based on the lack of evidence to warrant the conviction. The application was dismissed.

On appeal to the Supreme Court, Held, Henry, J., dissenting, that the conviction having been regular, and made by a court in the unquestionable exercise of its authority, and acting within its jurisdiction, the only objection being that the magistrate erred on the facts, and that the evidence did not justify the conclusion which he arrived at as to the guilt of the prisoner, the Supreme Court could not go behind the conviction, and inquire into the merits of the case by the use of a writ of *habeas corpus*, and thus constitute itself a court of appeal from the magistrate's decision.

The only appellate power conferred on the court in criminal cases, is by the 49th section of the S. & E. C. Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose upon the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.

Section 84 of The Supreme Court Amendment Act of 1876 does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus*, granted by a judge of the Supreme Court in chambers; and, as the proceedings before the court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of such judge in chambers, the said section does not authorize the court to issue a writ of *certiorari* in such proceedings; to do so, would be to assume appellate jurisdiction over the inferior court.

Semble, per Ritchie, C.J., that chapter 70 of the Revised Statutes of Ontario, relating to *habeas corpus*, does not apply to the Supreme Court of Canada.

In re Trepanier.—xii. 111.

Habeas Corpus—Continued.

5. *Application for writ of—Imprisonment of execution debtor—Application for discharge under chapter 118, R. S. (N.S.), 5th series—Examination of debtor—Fraud disclosed on—Remand to gaol for six months—Order dated on Sunday—New order.*

J. was in custody on an execution for debt, and applied to a judge of the County Court under chapter 118, R. S. (N.S.) 5th series, to be examined as to his affairs with a view to obtaining his discharge. The examination was held by the County Court Judge, who, on January 23rd, 1886, made an order to the effect that J. was adjudged guilty of fraud in respect to the delay of payment of his debt to the execution creditors, and in regard to the disposal of his property, and by such order remanded J. to jail, without privilege of jail limits, for a further period of six months from date of remand. When the order was drawn up it was dated 24th of January, 1886, which was Sunday, and directed that J. be confined in the county jail for six months from that date.

J. was taken back to jail, the order dated on Sunday being delivered to the jailer, and the counsel for the execution creditors on Monday, January the 25th procured from the County Court Judge another order dated the 25th, ordering J. to be imprisoned for six months from January 23rd.

Application was made to the Supreme Court of Nova Scotia for the discharge of the prisoner on *habeas corpus*, which was refused, the majority of the court holding that he was rightly held in custody, if not on the order of the County Court Judge, then on the original cause of his detention, the writ of execution.

On appeal to the Supreme Court of Canada, **Held**, that the appeal must be dismissed. Appeal dismissed without costs.

In re George R. Johnson.—20th February, 1886.

See PRACTICE OF SUPREME COURT, 31.

6. *Granted by judge in chambers—Appeal under s. 51 Supreme and Exchequer Act—Writ improvidently issued—Jurisdiction of court to quash—Control of court over its own process—Criminal case under s. 51—Supreme Court of British Columbia—Constitution of—Commission to judge presiding over—Trial of prisoner in—Order to change venue—Provision for increased expenses—Practice.*

Section 51 of the Supreme and Exchequer Courts Act does not interfere with the inherent right which the Supreme Court of Canada, in common with every superior court, has incident to its jurisdiction to enquire into and judge of the regularity or abuse of its process, and to quash a writ of *habeas corpus* and subsequent proceedings thereon when, in the opinion of the court, such writ has been improvidently issued by a judge of said court.—The said section

Habeas Corpus—Continued.

does not constitute the individual judges of the Supreme Court of Canada separate and independent courts, nor confer on the judges a jurisdiction outside of and independent of the court, and obedience to a writ issued under said section cannot be enforced by the judge but by the court, which alone can issue an attachment for contempt in not obeying its process. (Fournier and Henry, JJ., dissenting).

Per Strong, J.—The words of section 51 expressly giving an appeal when the writ of *habeas corpus* has been refused or the prisoner remanded, must be attributed to the excessive caution of the legislature to provide all due protection to the subject in the matter of personal liberty, and not to an intention to deprive the court of the right to entertain appeals from, and revise, rescind and vary, orders made under this section.

The right to issue a writ of *habeas corpus* being limited by section 51 to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case at common law. (Fournier and Henry, JJ., dissenting).

Per Fournier and Henry, JJ.—The restriction imposed by section 51 to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada" is merely intended to exclude any enquiry into the cause of commitment for the infraction of some provincial law; and the words "in any criminal case" were inserted to exclude the *habeas corpus* in civil matters; it is sufficient to give jurisdiction if the commitment be in virtue of an Act of the Parliament of Canada.

Query—Is section 51 of the Supreme and Exchequer Court Act *ultra vires*?

Semble, that when a judge in a province has the right to issue a writ of *habeas corpus* returnable in term as well as in vacation, a judge of the Supreme Court might make the writ he authorizes returnable in said court in term as well as immediately (Fournier and Henry, JJ., dissenting).

An application to the court to quash a writ of *habeas corpus* as improvidently issued may be entertained in the absence of the prisoner (Henry, J., dissenting).

After a conviction for a felony by a court having general jurisdiction over the offence charged, a writ of *habeas corpus* is an inappropriate remedy.

If the record of a superior court, produced on an application for a writ of *habeas corpus*, contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence (Henry, J., dissenting).

A return by the sheriff to the writ setting out such conviction and sentence and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff (Henry, J., dissenting).

The Supreme Court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, in the province; powers as full and ample as those known to the common law and possessed by the superior courts of England. The various statutes of British Columbia

Habeas Corpus—*Continued.*

providing for the holding of courts of oyer and terminer and general gaol delivery render unnecessary a commission to the presiding judge.

Per Strong, J.—The power of issuing a commission, if necessary, belonged to the Lieutenant-Governor of the province (Henry, J., *contra*).

An order made pursuant to Dominion statute 32 & 33 V. c. 29, s. 11, directing a change of venue, would be sufficient although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection, and even in a court of error there could be no valid objection to a conviction founded on such order. Even if a writ of *habeas corpus* in this case had been rightly issued, the prisoner on the materials before the judge was not entitled to his discharge, but should have been remanded.

In re Robert Evan Sproule.—xii. 140.

7. Habeas corpus appeal—First step the filing of the case with the Registrar—This must be done within 60 days from the pronouncing of judgment appealed from.

In re Smart.—xvi. 396.

And see JURISDICTION, 58.

Hand-writing—Proof of—Change of signature, documentary evidence admissible to prove.

See EVIDENCE, 39.

Harbour Commissioners—Jurisdiction of, of Montreal—Taxation of ferry boats by city.

See LEGISLATURE, 15.

Harbour, Public—*Letters patent under the great seal of P. E. I. of foreshore in Summerside Harbour, void*—B. N. A. Act, s. 108—*Public harbour*—25 V. c. 19.

G., defendant, was in possession of a part of the foreshore of the harbour of Summerside, and had erected thereon a wharf or block at which vessels might unload. H. *et al.*, plaintiffs, brought an action of ejectment to recover possession of the said foreshore. H. *et al.*'s title consisted of letters patent under the great seal of Prince Edward Island, dated 30th August, 1877, by which the Crown in right of the island, and assuming to act in exercise of authority conferred by a provincial statute, 25 V. c. 19, purported to grant to plaintiff in fee simple the land sought to be recovered in the action.

Held, that under s. 108, B. N. A. Act, the soil and bed of the foreshore in the harbour of Summerside belongs to the Crown, as representing the Dominion of Canada, and therefore the grant under the great seal of P. E. Island to H. *et al.* is void and inoperative.

Holman v. Green.—vi. 707.

Harbour, Public—Continued.

2. Grant by local government of foreshore of—Conveyance by grantee—Claim of dower by wife of grantee—Plea that grant void—Estoppel—Act of local legislature confirming title—Crown not expressly named.

See ESTOPPEL, 19.

Highway—Right to original road allowance—50 Geo. III. c. 1—4 Geo. IV. c. 10—20 V. c. 69, ss. 5, 6, 7—22 V. c. 99, ss. 305, 318—C. S. U. C. c. 54, ss. 318-29—30 V. c. 5, ss. 320, 334—36 V. (O.) c. 48, ss. 422, 426—Municipal Acts.

The plaintiff claimed in right of his wife under a deed to her, dated 1st October, 1867, of the south half of lot 9, in the 5th concession of Haldimand, to be entitled to the original allowance for road between lots 8 and 9, by reason of the Justices of the Quarter Sessions having in 1837, under 50 Geo. III. c. 1, and 4 Geo. IV. c. 10, laid out a road across this south half in lieu, as was claimed, of the original allowance; and he sued defendant for having destroyed a fence which plaintiff had recently erected across the original allowance for road at its point of intersection with the cross-roads.

Held, by the Supreme Court of Canada, affirming the judgment of the Court of Common Pleas of Ontario, and also the judgment of the Court of Appeal for Ontario, *see* 3 Ont. App. R. 175, that from 36 V. (Ont.) c. 48, and the preceding Municipal Acts, it is apparent that where the original allowance, in lieu of which a new road had been opened, lay between lands owned by different persons, as the road in question does, the owner of the land appropriated for the new road had no claim whatever to the original allowance further than to receive a conveyance from the municipality of a part only, and that only in case the municipality, in its discretion, should be of opinion that the original allowance was useless to the public, in which case, the municipality would have to express that opinion by a by-law passed for closing the original allowance. The plaintiff, therefore, must fail, for there never was any person entitled to call for a conveyance of the road in question, and the municipality had never pronounced it to be useless to the public.

2. The road in question lay along the whole length of the defendant's lot, and therefor came within s. 422, of 36 V. c. 48 (Ont.), and the municipality could not close it or deprive the defendant of the peculiar benefit he might derive from it as a highway adjoining his lands within that section, and perhaps, also, section 373, which provides for compensation for any damage to owners of property injuriously affected.

3. Further, the proper conclusion from the evidence was that the road established under the authority of the Quarter Sessions was not a road laid out in lieu of the original road allowance, but a wholly independent road.

Appeal dismissed with costs.

Cameron v. Wait.—7th May, 1879.

Highway—Continued.**2. Title to land—Dedication—Public highway—Expropriation—Presumption—User.**

K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost.

Held, reversing the judgment of the Supreme Court of Nova Scotia, 20 N. S. Rep. 95, that in the absence of any evidence of dedication of the road it must be presumed that the proceedings under the statute were rightly taken and K. could not recover.

Dickson v. Kearney.—June 14, 1888—xiv. 743.

3. Municipal corporation—Construction of crossing above level of highway—Negligence.

See MUNICIPAL CORPORATION, 10.

4. Municipal corporation—Duty of—Road allowance—Obligation to open—Substitution in lieu thereof—Jurisdiction of court over municipality—C. S. U. C. c. 54—R. S. O. 1887, c. 184, ss. 524, 531.

H. was owner of, and resided on, a lot in the eighth concession of the township of McG., and under the provisions of C. S. U. C. c. 54, an allowance was granted by the township for a road in front of said lot. This road was, however, never opened owing to the difficulties caused by the formation of the land, and a by-law was passed authorizing a new road in substitution thereof. Some years after H. brought a suit to compel the township to open the original road or, in the alternative, to provide him with access to his lot, and also to keep said road in repair and pay damages for injuries caused by the road not having been opened.

Held, affirming the judgment of the court below, that the provisions of the Act, C. S. U. C. c. 54, requiring a township to maintain and keep in repair roads, etc., and prohibiting the closing or alteration of roads only applied to roads which had been formally opened and used and not to those which a township, in its discretion, has considered it inadvisable to open.

Held, also, that the courts of Ontario have no jurisdiction to compel a municipality, at the suit of a private individual, to open an original road allowance and make it fit for public travel.

Hislop v. Township of McGillivray.—xvii. 479.

5. Railway passing near highway—Construction of road—Impairing usefulness of highway.

See RAILWAYS AND RAILWAY COMPANIES, 66.

Highway—Continued.

6. Ontario Municipal Act, ss. 535 (2), 538—Deviation of boundary road—Liability of counties to repair bridges in.

See MUNICIPAL CORPORATION, 24.
ROAD.

Husband and Wife—Insurable interest of husband in wife's property.

See INSURANCE, FIRE, 14.

2. Evidence of husband not admissible on behalf of wife.

See EXECUTOR, 5.

3. Divorce obtained in Quebec—Effect of—Right of wife to sue without authorization—Art. 14, C. C. P.

See DIVORCE.

4. Death of wife by negligence of railway company—Action by husband as administrator—Right to recover damages.

See RAILWAYS AND RAILWAY COMPANIES, 24.

5. *Sale by wife to secure debt due by her husband—Simulated deeds—Art. 1301, C. C.*

Where the sale of real estate by the wife, duly separated as to property from her husband, to her husband's creditor is shown to have been intended to operate as a security only for the payment of her husband's debts, such sale will be set aside as a contravention of Art. 1301, C. C. (P. Q.).

Per Strong, J., dissenting—The trial judge's finding in the present suit that the deeds of sale were not simulated, should be affirmed.

Klock v. Chamberlain.—xv. 325.

6. Assault on constable in discharge of duty—Serving summons charging violation of Canada Temperance Act—Wife not a competent witness on behalf of husband—R. S. C. c. 162, s. 34—R. S. C. c. 174, s. 216.

See CRIMINAL APPEAL, 11.

7. *Insolvent estate—Claim by wife of insolvent—Money given to husband—Loan or gift—Questions of fact—Finding of court below.*

M. having assigned his property to trustees for the benefit of his creditors his wife preferred a claim against the estate for money lent to M. and used in

Husband and Wife—*Continued.*

his business. The assignee refused to acknowledge the claim, contending that it was not a loan but a gift to M. It was not disputed that the wife had money of her own and that M. had received it. The trial judge gave judgment against the assignee, holding that M. did not receive the money as a gift. This judgment was confirmed on appeal.

Held, confirming the judgment of the Court of Appeal for Ontario, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law of Ontario, is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favour of the wife and confirmed by the Court of Appeal, this, the second appellate court, would not interfere with such finding.

Present.—Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Warner v. Murray.—April 6th, 1889—xvi. 720.

8. Distribution of intestate estate—*Feme coverte*—Husband's right to residuum—Next of kin—26 Geo. III. c. 11, ss. 14 & 17, (N. B.)—C. S. N. B. c. 78.

See DISTRIBUTION OF ESTATE.

9. Married woman—Execution against husband—Replevin—Justification by sheriff—Goods given by husband to wife—Married Woman's Property Act, R. S. N. S. 5th series, c. 74.

See SHERIFF, 12.

Hypothec—*Personal recourse in action on—Acceptance of delegation of payment—Amendment of pleadings—Payment of costs as condition precedent.*

On the 14th October, 1874, Mrs. Reeves sold to Quesnel the south of lot 4679 on the official plan of Montreal, and Mrs. Cadieux on the same day sold him the north half of the same lot. On the 17th October, 1874, Quesnel sold to Geriken, Laframboise and Robitaille three undivided fourths of both properties *en bloc*. On this last Quesnel received \$22,246.87, leaving due \$27,365.68, which the purchasers promised to pay for Quesnel to Mrs. Reeves with interest in certain instalments arranged to meet Quesnel's liability. Mrs. Reeves was not a party to this last deed, but she subsequently accepted, and served notice of her acceptance of, the delegation of payment made by such deed in her favour. Mrs. Reeves, prior to such acceptance, sued the joint proprietors hypothecarily for Quesnel's debt, and they made a *délaissement* of the portion of the lands sold by her to Quesnel. Subsequently she brought the present action against Geriken under the delegation for one-third part of the said debt of \$27,365.68 with interest. Geriken contended that having been obliged to *délaisser* a portion of the property, he could not be sued for any portion of the money.

Hypothec—Continued.

The Court of Queen's Bench for Lower Canada (appeal side) sustained this contention, Sir A. A. Dorion, C.J., and Ramsay, J., dissenting.

On appeal to the Supreme Court of Canada, Held, that if Geriken in the hypothecary action had been evicted from the whole of the property hypothecated he would have been relieved from personal responsibility under the delegation; but having been evicted from only a part interest in said property he was freed from liability under the delegation merely to the extent to which the eviction might be considered to have paid his share of the debt to Mrs. Reeves.

The court therefore ordered that, upon payment, as a condition precedent, of the costs incurred by plaintiff in the said Supreme Court and the Court of Queen's Bench, together with costs incurred by plaintiff in the Superior Court since the filing of defendant's pleas on record, the defendant be allowed to amend his pleas and to plead that he had been evicted from a part of the property sold to the said Geriken by Quesnel, and that what had been paid by said Geriken to Quesnel at the time of said sale paid, and even over paid, for the part of said property which the said Geriken detained, and that the cause be thereupon proceeded with in the said Superior Court in the ordinary course, and that in default of said amendment within three months the Superior Court, on motion to that effect, should enter judgment against defendant for \$8,281.25 with interest from the 14th October, 1874, and all the costs.

Reeves v. Perrault.—x. 616.

2. Hypothecary action against sub-purchasers—*Res inter alios acta*—Variation of original promise of sale by subsequent deed—Notary, evidence of, not admissible to contradict deed.

See SALE OF LANDS, 9.

3. Simulated hypothec given in payment of goods—Right to sue for price.

See SALE OF GOODS, 14.

4. Hypothec to the prejudice of creditors—Notorious insolvency of mortgagors—Art. 2023, C. C.

See INSOLVENCY, 30.

5. In an action *en déclaration d'hypothèque* the defendant may, in default of his surrendering the property within the period fixed by the court, be personally condemned to pay the full amount of the sheriff's claim. Art. 2075, C. C.

Dubuc v. Kidston.—xvi. 357.

And see PRACTICE, 3.

Improvements—Claim for, by incidental demand.

See PETITION OF RIGHT, 3.

Income.

See ASSESSMENT AND TAXES, 6.

Indian Lands—*Title to—Right of occupancy—Lands reserved for Indians—B. N. A. Act, s. 91, s-s. 24—s. 92, s-s. 5—ss. 109, 117.*

The lands within the boundary of Ontario in which the claims or rights of occupancy of the Indians were surrendered or became extinguished by the Dominion Treaty of 1873, known as the North West Angle Treaty, No. 3, form part of the public domain of Ontario and are public lands belonging to Ontario by virtue of the provisions of the British North America Act.

Only lands specifically set apart and reserved for the use of the Indians are "lands reserved for Indians" within the meaning of s. 91, item 24 of the British North America Act. Strong and Gwynne, JJ., dissenting.

St. Catharines Milling & Lumber Co. v. The Queen.—xiii. 577.

[The judgment in this case was affirmed by the Judicial Committee of the Privy Council: *See* 14 App. Cases 46].

(*See also* Church v. Fenton—5 Can. S. C. R. 239; Digest; "Assessment and Taxes 8"—Especially the judgments in the courts below 28 U. C. C. P. 384; 4 Ont. App. R. 159.)

Indictment—Directions by Attorney-General with reference to.

See CRIMINAL APPEAL, 1.

2. Misjoinder of counts.

See CRIMINAL APPEAL, 2.

3. For uttering forged cheque or order.

See CRIMINAL APPEAL, 6.

Influence—Undue.

See ELECTION, 1.

Injunction.

See TIMBER LICENSES, 1.

2. Maliciously obtaining.

See DAMAGES, 19.

3. To stay proceedings on illegal by-law of municipality.

See RAILWAYS AND RAILWAY COMPANIES, 18.

Injunction—Continued.**4. For infringement of trade mark**

See TRADE MARK.

5. Interim—Judgment quashing not appealable.

See JURISDICTION, 37, 38.

6. To restrain city of Montreal from collecting tax on ferry boats—39 V. c. 52, (P. Q.), validity of—By-law under *ultra vires*.

See LEGISLATURE, 15.

7. Nuisance—Pollution of water—Long established industry—Evidence.

See NUISANCE, 3.

3. Malicious prosecution—41 V. c. 14, s. 4, (P. Q.)—Dissolution of injunction—Action for damages—Want of probable cause.

See MALICIOUS PROSECUTION, 3.

9. Mining lands—Bornage—Appeal—Jurisdiction—R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 103.

10. Toll bridge—Franchise of—Free bridge, interference by—44-45 V. c. 90, (P. Q.).

See TOLLS, 3.

11. R. S. O. (1887), c. 159 as amended by 53 V. c. 42—Application to company incorporated by special charter—Collection of tolls—Maintenance of road.

See CORPORATIONS, 49.

Insanity.

See WILL, 7.

Inscription En Faux.

See PETITION OF RIGHT, 3.

Insolvency—Fraud or illegal preference—Presumption—Insolvent Act of 1875, s. 13, s-s. 1 and 3, and Insolvent Act of 1869, s. 86 and 88—Arts. C. C. L. C. 993, 1033, 1035, 1040—Doctrine of pressure opposed to Art. 1981, 1982 C. C. L. C.

T. F., a hotel keeper, being largely indebted, sold to A. B., his principal creditor, on the 13th January, 1875, by notarial deed, duly registered, certain moveable and immoveable property, being the bulk of his estate, comprising a hotel and furniture, for \$15,409.50. The immoveable property, valued by official assessors at \$22,000, was sold for \$10,000. The sale was also made subject to the right of redemption by F., on re-imbursing, within three years, the stipulated price of \$15,409.50, and interest at the rate of 8 p. c., with a provision that, in case of insolvency or default of payment, this right of *réméré* should cease. No delivery took place, and ten months later F., who remained in possession of the property under a lease from A. B. of the same date as that of the sale, also became bankrupt. In the meantime A. B. with F's consent, had leased the furniture to T. & J., in whose hands it was when appellant (F's assignee) revendicated it as part of the insolvent estate. T. & J. did not plead, but A. B. intervened and claimed the effects under the deed of sale above mentioned. The assignee contested the intervention, alleging that the deeds passed on the 19th January, 1875, had been made by T. F. in fraud of his creditors.

Held, that there was sufficient evidence to prove that the object of the transaction was to defeat F.'s creditors generally, and therefore the deeds of sale and lease of the 19th January, 1875, were null and void under Arts. 993, 1033, 1035 & 1040, C. C. L. C., and ss. 86 & 88 of Insolvent Act of 1869, and s. 3, s-s. 13 of Insolvent Act of 1875.

Rickaby v. Bell.—ii. 560.

2. Foreign bankruptcy—Assignment thereunder—Lands in Canada.

D., a naturalized British subject, who owned lands in Canada, resided and carried on business in partnership with H. & S., in the State of New York. In November, 1873, the firm of D., H. & S. became insolvent. On the 14th February, 1874, the said firm, under the Bankruptcy Act of the United States (s. 5, 103 Rev. Stat. U. S.), executed a deed purporting to "convey, transfer and deliver all their and each of their estate and effects" to one C., as trustee for the creditors. On the 26th September, 1874, a writ of execution against D.'s lands in Canada was placed in the hands of the proper sheriff by the respondents, who had in the meantime recovered judgment against him. Subsequently D., by way of further assurance, and in pursuance of the deed of the 14th February, 1874, granted to C., as trustee, his lands in Canada, specifying the different parcels. M., the appellant, was afterwards substituted to C. as trustee, and, as such, filed a bill in the Court of Chancery to obtain a declaration that the lands specified in the bill were not liable to the operation of the writ of execution of the respondents.

Held, that a bankrupt assignment, made under the provisions of an Act of the Congress of the United States of America, will not transfer immoveable property in Canada.

Insolvency—Continued.

Also, that the deed of the 4th February, 1874, was not effectual, either as a deed of bargain and sale, or a deed of grant to pass any legal title or interest in the lands of D. in Canada.

Macdonald v. Georgian Bay Lumber Company,—ii. 364.

3. *Plea of insolvency—Discharge not pleaded—Judgment after certificate granted.*

T. J. W. sued F. B., and on the 9th June, 1873, F. B. assigned his property under the Insolvent Act of 1869. On 6th August, F. B. became party to a deed of composition. On the 17th October, F. B. pleaded *puis darrein continuance*, that since action commenced he duly assigned under the Act, and that by deed of composition and discharge executed by his creditors he was discharged of all liability. On the 18th November, 1873, the Insolvent Court confirmed the deed of composition and F. B.'s discharge, but F. B. neglected to plead this confirmation. Judgment was given in favour of T. J. W. on the 30th January, 1874. On 30th May, 1876, an execution under the judgment was issued, and on 28th June, 1876, a rule *nisi* to set aside proceedings was obtained and made absolute.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that F. B., having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution. (Strong, J., dissenting, on the ground that the rule or order of the court below was not one from which an appeal could be brought under the Supreme and Exchequer Court Act.)

Wallace v. Bossom.—ii. 488.

4. *Insolvent Act, 1875—Trader—Pleading.*

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making the rule *nisi* taken out by the respondents absolute to set aside verdict for plaintiff and enter judgment for the defendants. The action was brought by C. as assignee of L. P. F., under the Insolvent Act of 1875, for several trespasses alleged to have been committed on the property known as the Shubenacadie canal property, and for conversion by C. *et al.* to their own use of the ice taken off the lakes through which that canal was intended to run. The declaration contained six counts, the plaintiff claiming as assignee of F. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said plaintiff was not, nor is such assignee as alleged." After the trial both counsel declined addressing the judge, and it was agreed that a verdict could be entered for the plaintiff with \$10 damages, subject to the opinion of the court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the court should have power to enter judgment for or against the defendants with costs. A rule *nisi* for a new trial to be granted accordingly, and filed. The rule was taken out as follows:—"On reading the minutes of the learned judge who tried the cause, and the papers on file herein, and on motion, it is ordered that the

Insolvency—Continued.

verdict entered herein formally by consent, subject to the opinion of the court, with power to take all objections arising out of the evidence and minutes, and with power to the court to enter judgment for or against defendants, with costs, be set aside with costs, and a new trial granted herein." The rule was made absolute in the following terms:—"On argument, etc., it is ordered that the rule *nisi* be made absolute with costs and judgment entered for the defendants against the plaintiff, with costs." Thereupon plaintiff appealed to the Supreme Court of Canada.

Held, Henry, J. dissenting, that by traversing the allegation of plaintiff being assignee, the defendants put in issue the facts implied in the averment, that the plaintiff was assignee in insolvency, and that F. was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that F. bought or sold in the course of any trade or business, or got his livelihood by buying and selling, that the plaintiff failed to prove this issue.

Per Gwynne, J.—Assuming F. to be a trader, still the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at *nisi prius* authorized the court to render a verdict for plaintiff or defendant, according as they should consider either party upon the law and the facts entitled; that the court, having exercised the jurisdiction conferred upon it by this agreement, and rendered judgment for the defendants, this court was also bound to give judgment on the merits, and as judgment of the court below in favour of the defendants was substantially correct to sustain it; and it having been objected that as the rule *nisi* asked for a new trial, the rule absolute in favour of defendants was erroneous, that such an objection was too technical to be allowed to prevail, and that the rule *nisi* having, as it did, recited the agreement at *nisi prius*, and the court below having rendered a verdict for the defendants, it should be upheld, except as to the plea of *liberum tenementum*, which should be found for the plaintiff or struck off the record, and that to order a new trial could be but to protract a useless litigation at great expense.

Creighton v. Chittick.—vii. 348.

5. *Judgment on demurrer appealable—S. 3 Supreme Court Amendment Act, 1879—38 V. c. 16, s. 3, construction of—Purchase of goods by insolvent outside of Dominion of Canada—Pleadings—Insolvent Act, 1875, ss. 136, 137 intra vires.*

P. et al., merchants carrying on business in England, brought an action for \$4,000 on the common counts against *J. S. et al.*, and in order to bring *S. et al.* within the purview of section 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by *S. et al.* from them on the 13th March, 1879, and another purchase on the 29th March of the same year; that when *S. et al.* made the said purchase they had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from *P. et al.*, thereby becoming their creditors with intent to defraud *P. et al.* *J. S.* (appellant) amongst other pleas pleaded

Insolvency—Continued.

that the contract out of which the alleged cause of action arose was made in England and not in Canada. To this plea *P. et al.* demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects resident and domiciled in Canada at the time of the purchase of the goods in question and had subsequently become insolvent under the Insolvent Act of 1875 and amendments thereto.

Held, Taschereau and Gwynne, JJ., dissenting, that although the judgment appealed from was a decision on a demurrer to part of the action only, it was a final judgment in a judicial proceeding within the meaning of the 3rd s. of Supreme Court Amendment Act of 1879.

Per Ritchie C.J. and Fournier, J.—1st. That sec. 136 of the Insolvent Act of 1875 is *intra vires* of the Parliament of Canada.

2nd. That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency, over which subject-matter the Parliament of Canada has power to legislate,

3rd. Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions of the 136th sec. of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed.

Per Gwynne J.—The demurrer does not raise the question whether sec. 136 of the Insolvent Act of 1875 is or is not *ultra vires* of the Dominion Parliament, for whether it be or be not the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore if the appeal be entertained it must be dismissed.

Per Strong, Henry and Taschereau JJ.—There being nothing either in the language or object of the 136th sec. of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant, stated in the second count of the declaration. In this view it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed.

The court being equally divided the appeal was dismissed without costs.

Shields v. Peak.—viii. 579.

6. *Insolvent Act of 1875—Unjust preference—Fraudulent preference—Presumption of innocence.*

W., the respondent, was a private banker, who had had various dealings with one D., and had discounted for him at an exorbitant rate of interest notes received by D. in the course of his business. D.'s indebtedness on new transactions amounted to a large sum of money, but, being a man of very sanguine temperament, he had entered into a new line of business, after obtaining goods on credit to the amount of \$4,000 or \$5,000, upon a representation to the

Insolvency—Continued.

parties supplying such goods that, although without any available capital, he had experience in business. About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to W., who advanced him \$800, part of which was applied in paying the over-due interest on the mortgage, and the surplus in retiring a note of D.'s held by W. D. executed a mortgage in favour of W. and was granted a reduced rate of interest on his indebtedness, and was told he would have to work carefully to get through. D. became insolvent about four months afterwards, and a suit was brought by McK., as assignee, impeaching the mortgage to W.

Held, affirming the judgment of the Court of Appeal, that McR. had not satisfied the *onus* which was cast upon him by the Insolvent Act, of showing that the insolvent at the time of the execution of the mortgage in question contemplated that his embarrassment must of necessity terminate in insolvency.

McRae v. White.—ix. 22.

7. Agreement to pledge moneys by debtor unable to meet his liabilities—When valid—Deposit in Bank.

See AGREEMENT, 7.

8. Of donor at date of donation, necessary to set aside donation in marriage contract.

See DONATION.

9. *Insolvent Act—Demand of assignment, when annulled, action for making—Reasonable and probable cause—Order of Judge annulling demand not prima facie evidence of—Evidence.*

In 1874 the firm of James Domville & Co. was composed of James Domville and James Scovil; and the firm of Estabrooks & Gleeson was then composed of John F. Estabrooks and the plaintiff. The latter firm carried on business then, in the city of Saint John, as dealers in flour, meal, &c., and there had been dealings between the firms for about two years previously, but not, so far as appeared, to any very large extent.

In the fall of that year, three promissory notes, made by Estabrooks & Gleeson in favour of Domville & Co., which had been indorsed by the latter firm, and which had been discounted for them by the Bank of Montreal, were lying in that bank when they matured. The first was a note for \$409.81, and it fell due on the 23rd November, 1874; the second was for \$109.71, due 4-7 December, and the third was for \$137.13, due 11-14 December.

On the 23rd November, when the first of these notes became due, the plaintiff called at the office of Messrs. Domville & Co., where he saw Mr.

Insolvency—Continued.

Scovil, and told him that he was unable to pay the note in full that day, but he offered Mr. Scovil 25 per cent. on account of it then, and asked to be allowed to renew for the difference. Mr. Scovil promised to speak to the defendant on the subject, and requested the plaintiff to call again and get his reply. The plaintiff accordingly called again shortly afterwards and found both Mr. Scovil and Mr. Domville in their office. The defendant then at once refused peremptorily to accept the offer which the plaintiff had made to Scovil, or to accept 50 per cent. and to renew for the balance for one month.

After three o'clock on the same day, the defendant called at the office of Estabrooks & Gleeson and told the plaintiff that if the note was not taken up by one o'clock the following day, an attachment would be issued against the firm of Estabrooks & Gleeson. The plaintiff urged him not to issue any attachment, assuring him that, not only Messrs. Domville & Co., but every one of the creditors of Estabrooks & Gleeson should be paid in full every dollar due to them. The defendant, however, refused to listen to these assurances.

The note for \$409.81 was not then retired, neither was the next one, for \$109, when it became due; but the third was paid in full at maturity.

Sometime in the month of December, (the plaintiff thought about the 7th,) Estabrooks & Gleeson received a letter from Mr. F. E. Barker, purporting to have been written by him as the solicitor, and on behalf of Domville & Co., intimating that Domville & Co.'s claim must be paid, or that Estabrooks & Gleeson must go into liquidation.

As the solicitor of Domville & Co., Mr. Barker, on the 16th December, 1874, issued an attachment at their suit against the property of Estabrooks & Gleeson, but which, so far as appeared on the trial, was never executed. The Deputy Sheriff, in whose hands it had been placed for execution, testified that no property was pointed out to him, and that he found none to attach under it.

On the 12th January, 1875, a demand was served on Estabrooks & Gleeson at the instance of Domville & Co., requiring Estabrooks & Gleeson to make an assignment under the Insolvent Act of 1869.

Within five days after service of such demand a petition, under the 15th section of the Act, signed by John F. Estabrooks and Patrick Gleeson individually, was presented to Judge Watters, the judge of the County Court of St. John, praying that no further proceedings should be taken under it. And due notice of the presentment of such petition having been given, and all parties being present either in person or by their counsel, before Judge Watters, he proceeded to inquire into the subject matter of it, and made the following order: "After hearing the parties and their evidence, as adduced before me, and it appearing to me that the said John F. Estabrooks and Patrick Gleeson have not ceased to meet their liabilities generally at the time of such demand, I do order that the prayer of the said petitioners be granted, and that no further proceedings be taken on such demand, with costs to be paid by the said James Domville and James Scovil to the said petitioners or to their attorney upon demand."

Insolvency—Continued.

Estabrooks & Gleeson effected an arrangement with Domville & Co. for the amount of the indebtedness for which the demand had been made by giving them an indorsed note, payable, with interest, in twelve months; which note the makers subsequently paid in full.

The plaintiff brought this action on the ground "that the defendant falsely and maliciously, and without reasonable and probable cause, made, or procured to be made, a demand under the 14th section of the Act of 1869, signed by the defendant and by one James Scovil, partners, under the name, style and firm of James Domville & Co., requiring plaintiff and the said John F. Estabrooks to make an assignment of his estate and effects for the benefit of his creditors, and falsely and maliciously, and without reasonable or probable cause, caused the same to be served upon the said plaintiff and the said John F. Estabrooks, according to the provisions of the said Act; and the said plaintiff and the said John F. Estabrooks, in pursuance of the provisions of the same Act, applied to and presented to Charles Watters, Esquire, the Judge of the County Court of the City and County of Saint John, their petition praying that no further proceedings, under the said demand, should be had against them under the said Act; and such proceedings were thereupon had under the said petition, that the said Judge, being authorized to act, and having competent authority in that behalf, ordered that the prayer of the said plaintiff and of the said John F. Estabrooks should be granted, and thereafter and thereby such demand so made and served as aforesaid became and was of no force, &c., and the proceedings thereon were determined; and by reason whereof the plaintiff was put to inconvenience and anxiety, and was prevented from transacting his business and carrying on his said trade with the said John F. Estabrooks, and was injured in his credit and incurred expense in procuring the said demand to be annulled," &c.

At the trial Duff, J., directed the jury that the annulling of the demand by the order of Judge Watters was *prima facie* evidence of the absence of reasonable and probable cause, and threw upon the defendant the burthen of proving the affirmative.

This ruling was upheld by the Supreme Court of New Brunswick, (3 Pugs. & Bur. 77.)

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that such order was not in itself even *prima facie* evidence of the absence of reasonable and probable cause; but, further, the evidence sufficiently established the existence of reasonable and probable cause for making the demand of assignment.

Appeal allowed with costs.

Domville v. Gleeson.—10th June, 1880.

10. Deposit in bank to meet composition notes.

See NEW TRIAL, 4.

11. Action of damages for malicious proceedings in—

See DAMAGES, 25.

Insolvency—Continued.**12. Voluntary assignment by insolvent—Right of assignee to sue—Arts. 13 & 19 C. C. P.**

See ASSIGNMENT, 6.

13. Insolvent Act of 1875, and amending Acts—Mortgage of insolvent's property—Transfer within thirty days in contemplation of insolvency—Fraudulent preference under s. 133—Merchants Shipping Act, 1854.

F., a ship owner in Yarmouth, N. S., employed as his agents in Liverpool, J. & Co., the defendant J. being a member of their firm, and, as agents in New York, he employed the firm of S. P. B., of which the defendant B. was a member. In the course of his dealings with these agents he became indebted to both firms for acceptances by them of his drafts made when he was in want of money, towards the payment of which they received the freights of his vessels and remittances in money. On one occasion he said that he would give to the Liverpool firm a mortgage on the "Tsernogora," or the "Magnolia," when they should require it, and, in a subsequent conversation with a member of the firm, he agreed to give such mortgage on certain conditions, which were not carried out. He also promised the firm in New York to give them security "in case anything happened," and mentioned as such security a mortgage on the "Tsernogora." According to F.'s own statement, he had sufficient property to pay his liabilities when these conversations took place. A few weeks after these conversations F. executed a mortgage of 20-64 shares of the "Tsernogora," in favour of the defendants J. & S., and had the same recorded, and within thirty days thereafter a writ of attachment in insolvency was issued against him. The plaintiff, who was appointed assignee of F.'s estate by his creditors, filed a bill to have the mortgage set aside, claiming that it was void under section 133 of the Insolvent Act of 1875. The defendant J. did not answer the plaintiff's bill, and the other defendants denied that the mortgage was made in contemplation of insolvency, and also claimed that, as it was made under the provisions of "The Merchants Shipping Act," (Imperial), it was not affected by the "Insolvent Act of 1875." The judge in equity, Nova Scotia, before whom the cause was heard, made a decree in favour of the plaintiff, and ordered the mortgage to be set aside, and the Supreme Court of Nova Scotia dismissed an appeal from that judgment.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Supreme Court of Nova Scotia, Henry, J., dissenting, that the promise to give security "in case anything should happen," could only mean "in case the party should go into insolvency," and that the transfer was void under section 133 of the Insolvent Act of 1875.

Held, also, that the provisions of the Merchants Shipping Act, did not prevent the property in the ship passing to the assignee under the Insolvent Act. (5 Russ. & Geld. 244).

Jones v. Kinney.—12th May, 1885.—xi. 708.

Insolvency—Continued.

14. Mortgage given by company in insolvent circumstances—Preference—Intention.

See FRAUDULENT PREFERENCE, 4.

15. Advances by bank to insolvent—Security on shares held by—Liability for maladministration of estate.

See BANKS AND BANKING, 12.

16. *Insolvent Act of 1875—Ss. 28, 29, 30—Sureties, liability of.*

Held, that where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have, by a resolution passed at a meeting of the creditors, continued him as assignee to the estate without exacting any further security, and while acting as such assignee he makes default to account for moneys of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee.

Letourneux v. Dansereau.—xii. 807.

17. Bank—Shareholders in—Winding up—Contributory, calls on—Double liability—Set off—R. S. C. c. 120.

See WINDING UP, 7.

18. Assignment for benefit of creditors—R. S. O. 1877, c. 124 s. 2—Construction of—Intent—Pressure—Criminal liability.

See ASSIGNMENT, 15.

19. Assignment for benefit of creditors—Fraudulent preference—R. S. O. 1877, c. 118—48 V. c. 26, s. 2 (O.).

See ASSIGNMENT, 17.

20. Of bank—Winding up Act—R. S. C. c. 129—Appointment of liquidators—Right to appoint another bank—Discretion of judge.

See WINDING UP, 10.

21. Insolvent Act of 1875—40 V. c. 41 s. 28 (D.)—Takes away right of appeal.

See JURISDICTION, 82.

Insolvency—Continued.

22. Transfer of personal property—Preference by—Pressure—Intent—49 V. c. 45, s. 2 (Man.)—Construction of.

See ASSIGNMENT, 21.

23. Bankruptcy and insolvency—Incorporation of trustees of the Bank of Upper Canada—31 V. c. 17 (D.)—33 V. c. 40 (D.), validity of—B. N. A. Act, s. 91.

See PARLIAMENT OF CANADA, 12.

24. Composition—Loan to effect payment of—Mortgage—Action to set aside as fraudulent—Arts. 1082, 1039 & 1040 C.C.

See PREFERENCE, 4.

25. *Claim against insolvent—Notes held as collateral security—Pledge—Collocation—Joint and several liability.*

Held, affirming the judgment of the court of Queen's Bench for Lower Canada (appeal side), that a creditor who by way of security for his debt holds a portion of the assets of his debtor, consisting of certain goods and promissory notes endorsed over to him for the purpose of effecting a pledge of the securities, is not entitled to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sum of money he may have received from other parties liable upon such notes or which he may have realized upon the goods.

Fournier, J., dissenting, on the ground that the notes having been endorsed over to the creditor, as additional security, all the parties thereto became jointly and severally liable and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of his co-debtors for the full amount of his claim until he has been paid in full without being obliged to deduct therefrom any sum received from the estates of the co-debtors jointly and severally liable therefor.

Gwynne, J., dissenting, on the ground that there being no insolvency law in force the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment, to collocate the appellants upon the whole of their claim as secured by the deed.

Benning v. Thibaudeau.—xx. 110.

26. *Joint and several debtors—Distribution of assets—Privilege—R. S. C. c. 129, s. 62—Winding-up Act—Deposit with bank after suspension—Practice—Leave to appeal—Order nunc pro tunc.*

Held, per Ritchie, C.J., and Taschereau, J., affirming the judgment of the court of Queen's Bench for Lower Canada (appeal side), Strong and Fournier,

Insolvency—Continued.

JJ., *contra*, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.

Per Gwynne and Patterson, JJ., that a person who has realized a portion of his debt upon the insolvent estate of his co-debtors cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his other co-debtor. R. S. C. c. 129, s. 62 (The Winding-up Act.)

Held, also (affirming the judgment of the court below) that a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

Ontario Bank v. Chaplin. xx. 152.

27. Acquiescence in Judgment—Attorney *ad litem*—Right of Appeal—Building Society—C. S. L. C. c. 69—By-laws—Transfer of Shares—Pledge—Art. 1970, C. C.—Insolvent—Creditor's Right of Action—Art. 1981, C. C.

A by-law of a building society (appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P. a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Bank Ville Marie as collateral security for an amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted to the appellant society in a sum of \$3,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate and with the action tendered the amount due by P. to the bank. The society claimed that the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side) and restoring the judgment of the Superior Court, that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society. Fournier and Taschereau, JJ., dissenting.

La Societe Canadienne-Francaise de Construction de Montreal v. Daveluy.
—xx. 449.

Insolvency—Continued.

28. Preference—By mortgage—Pressure—R. S. O. (1887) c. 124, s. 2.

See ASSIGNMENT, 24.

29. Insolvent bank—Lien on assets—Prerogative—Claim of Provincial Government—Priority.

See CROWN, 82.

See BANKS AND BANKING, 31.

30. *Hypothec to the Prejudice of Creditors—Notorious Insolvency of Mortgagors—Art. 2023, C. C.*

On or about the 28th day of February, 1883, the firm of E. "Piché et fils" made a voluntary assignment for the benefit of their creditors, in the hands of one P. L. Tousignant. Thereupon The Union Bank of Lower Canada, the appellants, on the 13th of March, 1883, took out against the said "E. Piché et fils" a writ of attachment, on the affidavit of their agent at Three Rivers, G. H. Henshaw; alleging, on the faith of the said assignment, that the said E. Piché et fils were notoriously insolvent and in bankruptcy. The personal property of E. Piché et fils was seized under the said writ. On the 27th of March, 1883, the appellants obtained from the assignee, Tousignant, a document by which he bound himself to grant *mainlevée* of a hypothec which had been given on the 17th November, 1882, by the said E. Piché et fils to the said Tousignant to secure him against endorsements to the amount of \$5,000, on certain promissory notes given for advances to E. Piché et fils, \$3,000 by the Hochelaga Bank (the respondents) and \$2,000 by Banque Ville Marie; and to allow the Union Bank to take a first hypothec on the immoveable hypothecated up to the sum of \$2,500. The Union Bank on their part agreed to obtain for E. Piché et fils a composition for 20c. in the dollar and a discharge from certain Montreal creditors.

Upon obtaining this document the appellants discontinued their proceedings under the said writ of attachment, and on the 29th of the same month, the Montreal creditors of E. Piché et fils signed a transfer of their respective claims to appellants; the latter fulfilling thereby the condition imposed upon them by the document of the 27th of March. On the 13th of April following, the same P. L. Tousignant who had signed the document of the 24th of March, gave a discharge of the mortgage that he held on the property of E. Piché et fils for \$5,000; who consented in favour of appellants to the mortgage contemplated by the document of the 27th of March, for \$2,650. The mortgaged property having been sold six months afterwards, the appellants were collocated for the amount of their claim.

The respondents contested this collocation, alleging the fact of the notorious insolvency of E. Piché et fils at the time of granting the said mortgage.

The Superior Court for Lower Canada rejected the respondents contestation on the grounds: 1. that by acceptance of the composition of 20c on the dollar by the Montreal creditors the Piché's had been placed in a position to

Insolvency—Continued.

resume their business. And 2. that respondents had acquiesced in the agreement between Tousignant and the appellants.

This judgment was reversed by the Court of Queen's Bench for Lower Canada (appeal side), on the grounds that the Pichés were notoriously insolvent when the hypothec for which respondents were collocated was given; that the appellants were aware of the insolvency as proved by the affidavit of Henahaw when applying for the writ of attachment; and that therefore under Art. 2023, C.C., the hypothec in question could not be invoked against the appellants and the other creditors of the insolvents.

On appeal to the Supreme Court of Canada that court concurred in the finding of the court appealed from and Held, that the appeal should be dismissed with costs. (Gwynne, J., dissenting).

Present: Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

The Union Bank of Lower Canada v. The Hochelaga Bank.—18th March, 1889.

31. Deed of sale—Fraudulent Preference—Evidence.

An action instituted in the Superior Court at Quebec on the 15th June, 1888, by William Laird, the respondent, to cause to be annulled a deed of sale made by John Lawson Gibb, one of the defendants, to James Gibb Ross, the other defendant, of all the real estate belonging to Gibb, situated within the City of Quebec, the price of sale being \$54,000. This deed was passed on the 23rd February, 1878.

John Lawson Gibb, one of the defendants, had been for several years previous to the institution of the action carrying on a large business at Quebec in partnership with Joseph Unwin Laird. Joseph Unwin Laird is the uncle and was the tutor of the respondent. In that capacity he lent a large sum of money belonging to his ward to the firm of Gibb, Laird & Co., of which he was a member, and credit in the books of that firm was given to the respondent for the amount of the loan.

In the month of April, 1888, the firm of Gibb, Laird & Co., stopped payment and became notoriously insolvent. At this time the firm was indebted to the respondent in the sum of \$26,759.75, for which amount he obtained judgment against them.

The contention of the respondent in this case is, that in February, 1878, when the sale by Gibb to Ross was made, the firm of Gibb, Laird & Co., was hopelessly insolvent, that Ross was aware of this insolvency and that the sale to him, though nominally for \$54,000 in cash, was in reality collusively made for the purpose of covering the indebtedness of the firm to Ross. The appellant pleaded to this action that the firm was represented to him at the time of the sale to be solvent, and that he had reason to believe that this statement was true, and that he *bonâ fide* paid for the price of the property in notes, which he afterwards took up, and that the whole transaction was in good faith, and caused no loss to the creditors of Gibb or to the firm of Gibb, Laird & Co. Upon this issue a long and contradictory *enquête* was held, and the Court below, on the 7th June, 1886, rendered judgment maintaining the con-

Insolvency—Continued.

clusions of the respondent's declaration and setting aside the deed on the ground that it was a collusive transaction for the purpose of giving a preference to a creditor. This judgment having been taken into appeal, the Court of Appeal confirmed the judgment of the Superior Court, Church, J., dissenting.

On appeal to the Supreme Court of Canada, that court (Ritchie, C.J., dissenting), took the view of the evidence adopted by Church, J., in the Court of Queen's Bench, viz., that there was not sufficient evidence to establish that the sale was simulated, or that it was intended to confer illegally and fraudulently an advantage over the other creditors of Gibb, Laird & Co. on the appellant, and that the appellant knew on the 23rd February, 1878, of the insolvency of the firm of Gibb, Laird & Co.; and therefore held, that the appeal should be allowed and the action dismissed with costs.

Present. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Ross v. Laird.—30th April, 1889.

32. Knowledge of by creditor—Fraudulent preference—Pledge—Warehouse receipt—Novation—Articles 1975, 1034, 1035, 1036, 1169, C. C.

W. E. E. connected with two business firms in Montreal, viz., the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and Elliott, Finlayson & Co., wine merchants, made a judicial abandonment on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The bank discounted for W. E. Elliott & Co., before the departure of W. E. E. for England, on the 30th June a note of \$5,087.50, due 1st October, signed by John Elliott & Co., and endorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took as collateral security from Finlayson who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On and about the 9th July 146 barrels were sold and the proceeds, viz., \$3,528.30 were subsequently, on the 9th August, credited to the note of \$5,087.50. On the 13th July McDougall, Logie & Co. failed and W. E. E. was involved in the failure to the extent of \$17,000, and on the 16th July, Finlayson as agent for W. E. E. left with the bank as collateral security against W. E. E.'s indebtedness of \$7,559.30 on the paper of MacDougall, Logie & Co., customers notes to the amount of \$2,768.28 upon which the bank collected \$1,603.43 and still kept a note of J. P. & Co. unpaid of \$1,165.32.

On the return of W. E. E. another note of John Elliott & Co. for \$1,101.33 previously discounted by W. E. E. became due at the bank, thus leaving a total debt of the Elliott firms on their joint paper of \$2,660.53. The old note of \$5,087.50 due 1st October and the one of \$1,101.33 were signed by John Elliott & Co. and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co. and secured by 200 barrels of oil, 146 barrels remaining from the original number pledged and an additional warehouse receipt of 54 barrels of oil, endorsed over by W. E. E. to Finlayson, Elliott & Co. and by them to the bank. The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August, and

Insolvency—Continued.

the giving of the notes on the 16th July to the bank were fraudulent preferences. The Superior Court, for L. C., held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 16th July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference.

On an appeal and cross-appeal to the Supreme Court:

Held, 1st, that the finding of the Courts below of the fact that the bank's knowledge of W. E. Elliott's insolvency dated from the 18th July was sustained by evidence in the case and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' papers not yet due. Gwynne, J., dissenting.

2nd. That the additional security given to the bank on the 10th August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co. was also a fraudulent preference. Gwynne, J., dissenting.

3rd. Reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil and that they became immediately the property of the insolvent's creditors and could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s substituted note. Arts. 1169 & 1084 C. C. Gwynne and Patterson, JJ., dissenting.

Appeal allowed and cross-appeal dismissed with costs.

Present: Strong, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Stevenson v. Canadian Bank of Commerce.—20th February, 1893.—xxii.

33. Chattel mortgage—Preference—*Bona fide* advance—Consideration partly bad, effect on whole instrument—R. S. O. 1887, c. 124, s. 2.

See CHATTEL MORTGAGE, 18.

FRAUDULENT PREFERENCE.

PREFERENCE.

Institute.

See DEED 3.

WILL 10.

Insurance, Fire—Interim Receipt—Description of premises in policy—Authority of agent.

On the 9th of August, 1871, the plaintiffs (respondents) applied to the defendants (appellants) through their agent H., at Hamilton, for an insurance
CAS. DIG.—23

Insurance, Fire—Continued.

on goods to the amount of \$6,000, contained in a store on the south side of King street, described in the application as No. 272 in defendants' special tariff book, and marked No. 1 on a diagram endorsed in pencil by the secretary of the company at Montreal; this diagram being a copy of the diagram on a previous application for policy by insured. The premium was fixed at 62½ cents on the \$100, and was paid on the 10th of August. On the said 10th of August the plaintiffs gave a written notice to H. that they had added two flats next door to their former premises (which would form part of No. 278 in defendants' special tariff book), and that part of their stock was then in these new flats. A few days later H. inspected the building, and said the rate would have to be increased in consequence of the cuttings. On the 29th of August, H. notified defendants of the opening into the adjoining building, but did not communicate the written notice in its entirety. An increased rate, making it one per cent., was fixed, and paid by the 23rd September, the agent issuing an interim receipt, dated back the 9th of August, for the full premium. The policy issued immediately thereafter, dated as of the 9th of August, describing the premises substantially as in the application of the 9th of August, and referring to the diagram endorsed on the application of the insured, S. T., 272. On the policy there was an N. B. in reference to "an opening in the east end gable of the premises, through which communication is had with the adjoining house occupied by one ——." The policy was handed to the plaintiffs in September, 1871, and the loss by fire occurred in March, 1872.

The plaintiffs brought an action in the Court of Queen's Bench on the policy, but failed on the express ground that the description therein did not extend to nor cover goods which were in the added flats.

Thereupon the plaintiffs filed their bill to reform the policy or restrain the defendants from pleading in the action at law that the policy covered only goods contained in S. T., No. 272.

Held, *per* Richards, C.J., and Strong and Taschereau, JJ., that the construction of the application, written notice and interim receipt, read together, established a contract of insurance between the plaintiffs and the defendants, embracing the goods situated in the flats added by plaintiffs, and that notwithstanding the acceptance of a policy which did not cover goods in the added flats, plaintiffs were entitled to recover for the loss sustained in respect of the goods contained in such added flats.

Per Ritchie, Fournier and Henry, JJ., that the evidence did not establish an application for insurance on the goods in the added flats, nor an agreement for such insurance by the agent, but that the application, interim receipt and agreement were confined to the goods in the premises, S. T., No. 272.

The court being equally divided the appeal was dismissed without costs.

The L. and L. and Globe Ins. Co. v. Wyld.—i. 604.

Insurance, Fire—Continued.**2. *Misrepresentation as to situation of risk—Survey made by agent.***

C. M., appellants' agent, solicited and prevailed on T. S. to insure his premises with the appellants. Previously he had examined the premises to be insured, and on the 22nd April, 1874, T. S. signed the application which C. M. had caused to be filled up, and upon the back of which was a diagram purporting to represent the exact situation of the building in relation to adjoining buildings. T. S. stated at the time of signing the application that the distances put down in the diagram were not accurate. C. M. promised he would go to the property and make an accurate measurement of the distances. By one of the conditions of the policy it was provided, that if an agent should fill up the application, he should be deemed to be the agent for that purpose of the insured and not of the company, but the company will be responsible for all surveys made to their agents personally.

Held, affirming the judgment of the Court of Error and Appeal, that with respect to the survey, description and diagram the assured was dealing with C. M., not as his agent, but as the agent of the company, and that therefore any inaccuracy, omissions or errors therein were those of the agent of the company, acting within the scope of his deputed authority, and not of the assured.

Hastings Mutual Fire Insurance Co. v. Shannon.—ii. 394.

3. *Misstatement as to encumbrances—Indivisibility of policy—s. 36, c. 44, 36 V. (O.).*

The appellants issued to the respondents, in consideration of \$190, a policy of insurance to the amount of \$3,000, as follows, viz.: \$1,000 on their building, and \$2,000 on the stock. In the respondents' application, which had been signed in blank and delivered to the person through whose instrumentality the policy was effected, it was stated that there were no encumbrances on the property, although there were several mortgages. It was also proved that after the issuing of the policy the respondents effected a further encumbrance on the land, but did not notify defendants. The policy was made subject to 36 V. c. 44, (O.). The proviso (since repealed by 39 V. c. 7,) to s. 36 declared, "That the concealment of any encumbrances on the insured property, or on the land on which it may be situate, * * * shall render the policy void, and no claim for loss shall be recoverable thereunder, unless the board of directors shall see fit in their discretion to waive the defect." One of the conditions of the policy provided that the policy should be made void by the omission to make known any fact material to the risk. On an action upon the policy the Court of Common Pleas refused to set aside the verdict in favour of the appellants, but on appeal to the Court of Error and Appeal for Ontario it was held that the policy was divisible and that respondents were entitled to recover the insurance on the stock.

Held, on appeal, that the contract of insurance on the building and on the stock was entire and indivisible, and that the misrepresentation as to

Insurance, Fire—Continued.

encumbrances, by the conditions of the policy, as well as by the 36 s. of 36 V. c. 44 (O.). rendered the policy wholly void.

The Gore District Mutual Fire Insurance Co. v. Samo.—ii. 411.

**4. Trust Assignment—Conditions of Policy—Notice to agent—
Loss payable to creditors—Right of action.**

The appellant, being indebted to certain persons and desiring to have his stock of goods insured, applied to the agents of respondents for insurance to the amount of \$2,000 for three months, "loss if any to be payable to his creditors of whom G. McK. is one and McM. & Co. are second." An interim receipt was issued by the company, dated 19th November, 1877, which stated the insurance to be subject to the conditions contained in and endorsed upon the printed form of policy in use by the company, one of which conditions (No. 4) stated, that if the property insured should be assigned without a written permission endorsed on the policy by an agent of the company duly authorized for such purpose, the policy should be void. On the 23th November the appellant transferred the insured property to the said G. McK., in trust for his creditors, the balance, if any, to be payable to himself. The agent of the company was notified of this transfer and assented to it, stating that no notice to the company was necessary, the policy being made payable to the creditors. The property was destroyed by fire on the 15th January, 1878. The policy sued upon was dated the 12th December, 1877, but was not delivered until the morning after the fire. By it the loss was made "payable to G. McK. and McM. & Co. and others as creditors, as their interests may appear." After the fire the inspector of the company wrote twice to McK. calling for proof of loss.

Held, reversing the judgment of the Court of Appeal for Ontario, that the notice of the trust assignment to the company's agent was sufficient, that the company must be considered as having assented to such assignment, and as having executed the policy with full knowledge of it; and that such assignment was not one contemplated by the condition of the policy.

2. That the words "loss payable, if any, to G. McK., &c.," operated to enable the respondents, in fulfilment of that covenant, to pay the parties named; but as they had not paid them, and the policy expressly stated the appellant to be the person with whom the contract and the respondents' covenant was made, the action for a breach of that covenant was properly brought by him alone.

McQueen v. The Phoenix Mut. F. Ins. Co.—iv. 660.

**5. Mutual Insurance Company—Uniform conditions Act, R. S. O.
c. 162, not applicable to mutual insurance companies—
Action premature.**

Appellants, a mutual insurance company, issued in favour of J. F., a policy of insurance, insuring him against loss by fire on a general stock of goods in a country store, and under the terms of the policy, the losses were only to be paid within three months, after due notice given by the insured,

Insurance, Fire—Continued.

according to the provisions of 86 V. c. 44, s. 52 (O.), now R. S. O. c. 161, s. 56, which provides that, in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidence, and examinations, called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proof of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after receipt by the company of such proofs. A fire occurred on the 21st May, 1877. On the next morning J. F. advised the insurance company by telegraph. On the 29th June, 1877, the secretary of the company wrote to J. F.'s attorneys, that if he had any claim he had better send in the papers, so that they might be submitted to the board. On the 3rd July, 1877, J. F. furnished the company with the claim papers, or proofs of loss, and the 13th July he was advised that, after an examination of the papers at the board meeting, it was resolved that the claim should not be paid. On the 23rd August, 1877, J. F. brought this action upon the policy. The appellants pleaded *inter alia* that the policy was made and issued subject to a condition, that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss, to be furnished by the plaintiff to the defendants; and averred the delivery of the proofs on the 3rd July, 1877, and that less than three months elapsed before the commencement of this suit.

Held, on appeal, 1st. That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O. c. 162.

2nd. That the appellant company under the policy were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought. *Ballagh v. The Royal Mutual Fire Insurance Company* (5 Ont. App. R. 87) approved.

The Mutual Fire Insurance Co. of the County of Wellington v. Frey.—v. 82.

6. Subsequent and further insurance—Substituted policy.

The appellants sued upon a policy of insurance made by the respondents on the 28th April, 1877. On the face of the policy it appeared that there was "further insurance, \$8,000," and the policy had endorsed upon it the following condition, being statutory condition No. 8, R. S. O. c. 162: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing signed by a duly authorized agent." Among the insurances, which formed a portion of the "further insurance" for \$8,000 mentioned in the policy, was one for \$2,000 in the Western Insurance Company, which appellant allowed to expire, substituting a policy for the same amount in the Queen Insurance Company, without having obtained the consent of, or notified the respondents.

Insurance, Fire—Continued.

Held, reversing the judgment of the court below, that the condition as to subsequent insurance must be construed to point to further insurance beyond the amount allowed by the policy, and not to a policy substituted for one of like amount allowed to lapse, and therefore the policy sued upon was not avoided by the non-communication of the \$2,000 insurance in the Queen Insurance Company.

Parsons v. The Standard Fire Insurance Company.—v. 233.

7. Insurable interest—Advances made to build a vessel.

C. made advances to B. upon a vessel, then in course of construction, upon the faith of a verbal agreement with B., that after the vessel should be launched, she should be placed in his hands for sale, and that out of the proceeds the advances so made should be paid. When vessel was well advanced C. disclosed the facts and nature of his interest to the agent of the respondent's company, and the company issued a policy of insurance against loss by fire to C. in the sum of \$3,000. The vessel was still unfinished, and in B.'s possession when she was burned.

Held, reversing the judgment of the court below, that C.'s interest, relating as it did to a specific chattel, was an equitable interest which was insurable, and therefore C. was entitled to recover.

Clarke v. The Scottish Imperial F. Ins. Co.—iv. 192.

8. Insurable interest—Transfer of—Art. 2482, C. C. L. C.

The appellants granted a fire policy to one T. on divers buildings and their contents for \$3,280. In his written application T. represented that he was the owner of the premises, while he had previously sold them to S., the respondent, subject to a right of redemption, which right T., at the time of the application, had availed himself of by paying back to S. a part of the money advanced, leaving still due to S. a sum of \$1,510. Subsequent to the application, and after some correspondence, the respective interests of T. and S. in the property were fully explained to the appellants through their agents. Thereupon a transfer for—(the amount being in blank) was made to S. by T. and accepted by the appellants. The action was for \$3,280, the amount of insurance on the building and effects.

Held, that at the time of the application for insurance T. had an insurable interest in the property, and as the appellants had accepted the transfer made by T. to S., which was intended by all parties to be for \$1,500, the amount then due by T. to S., the latter was entitled to recover the said sum of \$1,500.

2nd. That S. having no insurable interest in the moveables, the transfer made to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to said moveables. Art. 2482.

The Ottawa Agricultural Insurance Company v. Sheridan.—v. 157.

9. Insurable interest.

See INSURANCE, MARINE, 2.

Insurance, Fire—Continued.**10. Existing Insurance—Notice to Agent—Application and Policy.**

The plaintiff, desiring to effect further insurance for two months on certain machinery, applied to defendants' company, through one S., their agent at D., authorized to receive applications, accept premiums and issue interim receipts, valid only for thirty days. He informed S. that there were other insurances on the property, but not knowing the amount that there was in the Gore Mutual, requested him to ascertain it, and signed the application partly in blank, paid the premium and obtained an interim receipt, valid only for thirty days. S. failed to do what he promised to do, and what plaintiff had entrusted him to do, and forwarded the application to the head office at T., making no mention of the insurance in the Gore Mutual. The company accepted the risk, and, in accordance with their practice, where the risk extended only over a short period, instead of a formal policy, they issued a certificate, which stated that the plaintiff was insured subject to all the conditions of the company's policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not endorsed on the policy.

Held, that as the application in writing did not contain a full and truthful statement of previous insurances, the verbal notice to the agent of the existing policy in the Gore Mutual, without stating the amount, was inoperative to bind the company; the plaintiff was not entitled to have the policy reformed by the endorsement of the Gore Mutual policy thereon, and could not recover.

Billington v. Provincial Insurance Co.—iii 182.

11. Interim receipts—Agents, powers of.

This was an action brought on an interim receipt, signed by one S., an agent for the respondent company at L. One of the pleas was that S. was not respondent's duly authorized agent, as alleged. The general managers of the company for the Province of Ontario had appointed, by a letter, signed by them both, one W. as general agent for the city of L. S., the person by whom the interim receipt in the present case was signed, was employed by W. to solicit applications, but had no authority from, or correspondence with, the head office of the company. In his evidence S. said he was authorized by W. to sign interim receipts, and the jury found he was so authorized. He also stated that W't one of the joint general managers, was informed that he (S.) issued interim receipts, and that the former said he was to be considered as W's agent. There was no evidence that the other general manager knew what capacity S. was acting in.

Insurance, Fire—Continued.

Held, affirming the judgment of the Court of Appeal for Ontario, that W. had no power to delegate his functions, and that S. had no authority to bind the respondent company.

Per Strong, J.—That the general agents, being joint agents, could only bind the respondent company by their joint concurrent acts; the appointment of S. as agent by W't, without the concurrence of the other general manager, would not have been sufficient.

Summers v. The Commercial Union Insurance Co.—vi. 19.

12. Action for calls against shareholders.

See CORPORATIONS, 9.

13. Jurisdiction of Local Legislature over subject-matter of.

See LEGISLATURE, 5.

14. Fire Insurance Policy—Termination by company—Surrender—Waiver—Estoppel—Husband and wife—Insurable interest in wife's property—Tenant for life—Damages—Practice—Parties—Striking out name of wife joined as co-plaintiff.

A. effected insurance on C.'s property, on which he held a mortgage, under authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A. took policy to agent of insurers, who was also agent of the W. Ins. Co., and left it with him, directing him to put risk in latter company. No receipt was given, and property was destroyed by fire immediately after. Company resisted payment on the ground that policy was surrendered, and contended on the trial, in addition, that C. had parted with his interest in the property by giving a deed to one B. who had re-conveyed to C.'s wife, and that proper proofs of loss had not been given, claiming, in reply to a plea of waiver in regard to such proofs, that such waiver should have been in writing, according to a condition in the policy. They had refused to return policy on demand.

Held, reversing the judgment of the court below, Fournier, J., dissenting that C. had an insurable interest in the property at the time of the loss, as the husband of the owner in fee and tenant by the courtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by the deed to B.

That the company, by wrongfully withholding the policy, were estopped from claiming that proofs of loss had not been given according to endorsed condition, and were equally estopped from setting up the condition requiring waiver of such proofs to be in writing, if such condition applied to waiver of proofs of loss.

Insurance, Fire—Continued.

That the measure of damages recoverable by tenant for life of the insured premises is the full value of such premises to the extent of the sum insured.

Per Fournier, J., dissenting, that the sending of the circular by the company, and compliance with its terms by the assured in giving up the policy to the company's agent, was a surrender of said policy, and plaintiff therefore could not recover.

Under the practice in Nova Scotia where the wife is improperly joined as co-plaintiff with the husband the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone.

Caldwell v. The Stadacona Fire and Life Ins. Co.—xi. 212.

15. Appeal—New trial ordered by court below—Questions of law—Insurance policy—Insurable interest—Special condition—Renewal—New contract.

J., the manager of appellant's firm, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance J. represented appellant to be mortgagee of the stock of S. S. became insolvent, and J. was appointed creditor's assignee, and the property of the insolvent was conveyed to him by the official assignee. On March 8th, 1876, S. made a bill of sale of his stock to J., having effected a composition with his creditors under the Insolvent Act of 1875, but not having had the same confirmed by the court. The insurance policy was renewed on August 5th, 1876, one year after its issue. On January 12th, 1877, the bill of sale to J. was discharged and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on March 8th, 1877. An action having been brought on the policy it was tried before Smith, J. without a jury, and a verdict was given for the plaintiff. The Supreme Court of Nova Scotia set aside this verdict, and ordered a new trial, on the ground that plaintiff had no insurable interest in the property when insurance was effected, and that no interest subsequently acquired would entitle him to maintain the action. By the practice of the Court a verdict for the defendant could not be entered.

One of the conditions of the policy was "that all insurances whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself, or by the surrounding or adjacent buildings."

On appeal the Supreme Court of Canada, **Held, 1.** That the appeal should be heard. *Eureka Woollen Mills Company v. Moss*, 11 Can. S. C. R. 91, approved and distinguished.

Insurance, Fire—Continued.

2. That the appellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract.

Howard v. The Lancashire Insurance Company.—xi. 92.

16. Condition in policy—Not to assign without written consent of company—Breach of condition—Chattel mortgage.

Where a policy of insurance against loss or damage by fire contained the following provision :—" If the property insured is assigned without the written consent of the company at the head office endorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall thereby become void and all liability of the company shall thenceforth cease."

Held, affirming the judgment of the Supreme Court of N.B., that a chattel mortgage of the property insured was not an assignment within the meaning of such condition.

Sovereign F. Ins. Co. of Can. v. Peters.—xii. 38.

17. Condition in policy—Loss by explosion—Loss by fire caused by explosion—Exemption from liability.

A policy of insurance against fire contained a condition that " the company will make good loss caused by the explosion of coal gas in a building not forming part of gas works, and loss by fire caused by any other explosion, or by lightning." A loss occurred by the dropping of a match into a keg of gunpowder on the premises insured, the damage being partly occasioned by the explosion of the gunpowder, and partly by the gunpowder setting fire to the stock insured. The company admitted their liability for the damage caused by fire, but not for that caused by the explosion.

Held, reversing the judgment of the Court of Appeal for Ontario, 11 Ont. App. R. 741, Taschereau, J., *dubitante*, that the company were not exempt by the condition in the policy from liability for damage caused by the explosion.

Hobbs v. The Northern Assurance Company.—9th April, 1886. } xii. 631.
Hobbs v. The Guardian Assurance Company.

18. Condition in policy—Subsequent insurance—Notice to company—Waiver.

A policy of insurance against loss by fire contained the following condition :—" In case of subsequent assurance on any interest in property assured by this company (whether the interest assured be the same as that assured by this company or not) notice thereof must be given in writing at once, and such subsequent assurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect." The insured effected subsequent insurance and verbally notified the agent, but there was no indorsement made

Insurance, Fire—Continued.

on the policy, nor any acknowledgment in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he, nor the agent, made any objection to the loss on the ground of non-compliance with the above condition. In a suit to recover the amount of the policy the company pleaded breach of the condition in reply to which the plaintiff set up a waiver of the condition and contended that by the act of the agent and inspector the company were estopped from setting it up.

Held, reversing the judgment of the court below, that the insured not having complied with the condition the policy ceased and became of no effect on the subsequent insurance being effected, and that neither the agent nor the inspector had power to waive a compliance with its terms.

Western Assurance Co. v. Doull.—xii. 446.

19. *Condition—Production of magistrate's certificate—Waiver of condition.*

A policy of insurance against fire contained the following conditions:—

"The assured must procure a certificate, under the hands of two magistrates most contiguous to the place of fire, and not concerned or directly or indirectly interested in the loss or assurance as creditors or otherwise, or related to the assured or sufferers, that they are acquainted with the character and circumstances of the assured, and have made diligent inquiry into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured really, by misfortune and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned."

"No one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by indorsement upon this policy, signed by the agents of the company at Halifax, N.S." The insured premises having been destroyed by fire the assured applied to two magistrates contiguous to the place of the fire for the required certificate, which they refused, and he finally obtained such certificate from two magistrates residing at a distance from such place. The proofs of loss, accompanied by the certificate, were sent to the agent, who subsequently made an offer of payment to compromise the claim, stating that if such offer was not accepted the claim would be contested. The agent, on a subsequent occasion, told the assured that he objected to the claim, as he "did not think it was a square loss."

Held, affirming the judgment of the court below, that the non-production of the certificate required by the above condition prevented the assured from recovering on the policy.

Held, also, that even if such condition could be waived without indorsement on the policy, the acts of the agent did not amount to a waiver.

Semble, that the condition could not be so waived.

Logan v. Commercial Union Ins. Co.—xiii. 270.

Insurance, Fire—Continued.**20. Condition in policy—Not to carry on hazardous or extra hazardous business—Violation of condition—No increase of risk.**

A policy on a building described in the application for insurance as a spool factory contained the following conditions:—"That in case the above described premises shall at any time during the continuance of this insurance, be appropriated or applied to or used for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous or for the purpose of storing, using or vending therein any of the goods, articles or merchandise denominated hazardous or extra hazardous unless otherwise specially provided for, or hereafter agreed to by the defendant company in writing or added to or endorsed on this policy, then this policy shall become void. Any change material to the risk, and within the control or knowledge of the insured, shall void the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent."

Held, reversing the judgment of the court below, that the introduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly that such manufacture in itself was a hazardous, if not an extra hazardous business, notwithstanding that on the trial of the action on the policy the jury found, in answer to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured.

Sovereign Fire Ins. Co. v. Moir.—xiv. 612.

21. Description of property—Error in policy—Statutory condition—R. S. O. c. 162—Just or reasonable variation.

The agent of an insurance company filled in an application for insurance on a building built of boards and fixed the premium at the rate demanded on brick buildings there being no tariff for value for board buildings. The words "boards" was so badly written that it was difficult to decipher it, but the character of the building was designated on a diagram on the back of the application, which the agents were instructed to mark with red in case of a brick, and black in case of a frame building. In this case it was in black. At the head office the word intended for boards was read "brick," and the policy issued as on a brick building. A loss having occurred, the company, under a clause in the policy, caused an arbitration to be had, but afterwards refused to pay the amount awarded to the insured, claiming that by reason of the error in the policy there was no existing contract of insurance.

Held, affirming the judgment of the court below, that as there had been no misrepresentation by the assured, and no mutual mistake, the parties were *ad idem* and the contract was complete, and even if it were otherwise the company could not set up this defence after treating the contract as existing by the reference to arbitration under the policy.

Insurance, Fire—Continued.

By the 17th condition in c. 162, R. S. O., a loss is not payable until 30 days after proofs of loss are put in unless otherwise provided by statute or agreement of the parties.

Held, per Ritchie, C.J., and Fournier, Henry and Gwynne, JJ., that this is a privilege accorded to the company, and while the time may be further limited by agreement it cannot be extended.

Per Strong, J.—That a variation of the condition by inserting a clause in the policy extending the time to 60 days is not a variation by agreement of the parties, nor is such varied condition a just or reasonable one.

The City of London Fire Insurance Co. v. Smith.—xv. 69.

22. Fire insurance—Insurable interest—Mortgagee—Assignment of policy.

In 1877 T. held a policy of insurance on his property which he mortgaged to W. in 1881, and an endorsement on the policy which had been annually renewed, made the loss payable to W. In 1882 T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W., an endorsement was made on the policy permitting the premises to remain vacant. The policy was renewed each year until 1885, when all the policies of the insurance company were called in and replaced by new policies, that held by W. being replaced by another in the name of T., to which W. objected and returned it to the agent who retained it. The premiums were paid by W. up to the end of 1886.

The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T. having the vacancy permit and an assignment from T. to W. endorsed thereon and containing a condition not in the old policy, namely, that all endorsements or transfers were to be authorized by the office at St. John, N. B., and signed by the general agent there. The company having refused payment, an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action and ordered a new trial on the ground that his interest was not insured and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision to the Supreme Court of Canada,

Held, reversing the judgment of the court below, 20 N. S. Rep. 487, that the company, having accepted the premiums from W. with knowledge of the fact that T. had ceased to have any interest in the property, they must be taken to have intended to deal with W. as owner of the property and the contract of insurance was complete.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau and Gwynne, JJ.

Wyman v. Imperial Insurance Co.—Oct. 9th, 1888—xvi. 715.

Insurance, Fire—Continued.**"23. Fire insurance—Insurance by mortgagee—Interest insured—
Payment to mortgagee—Subrogation.**

Mortgagees of real estate insured the mortgaged property to the extent of their claim thereon under a clause in the mortgage by which the mortgagor agreed to keep the property insured in a sum not less than the amount of the mortgage, and if he failed to do so that the mortgagees might insure it and add the premiums paid to their mortgage debt. The policy was issued in the name of the mortgagor who paid the premiums, and attached to it was a condition that whenever the company should pay the mortgagees for any loss thereunder, and should claim that as to the mortgagor no liability therefor existed, said company should be subrogated to all the rights of the mortgagees under all securities held collateral to the mortgage debt to the extent of such payment. A loss having occurred the company paid the mortgagees the sum insured, and the mortgagor claimed that his mortgage was discharged by such payment. The company disputed this and insisted that they were subrogated to the rights of the mortgagees under the said condition. In an action to compel the company to give a discharge of the mortgage :

Held, per Fournier, Taschereau and Gwynne, JJ., that the insurance effected by the mortgagees must be held to have been so effected for the benefit of the mortgagor under the policy, and the subrogation clause which was inserted in the policy without the knowledge and consent of the mortgagor could not have the effect of converting the policy into one insuring the interest of the mortgagees alone; that the interest of the mortgagees in the policy was the same as if they were assignees of a policy effected with the mortgagor; and that the payment to the mortgagees discharged the mortgage.

Held, also, that the company were not justified in paying the mortgagees without first contesting their liability to the mortgagor and establishing their indemnity from liability to him; not having done so they could not, in the present action, raise any questions which might have afforded them a defence in an action against them on the policy.

The result of the decision of the Court of appeal (15 Ont. App. R. 421) and of the Divisional Court (14 O. R. 322) was affirmed.

Present:—Strong, Fournier, Taschereau and Gwynne JJ.

The Imperial Fire Ins. Co. v. Bull.—June 14, 1889.—xviii, 697.

**"24. Fire insurance—Construction of policy—Asylum for insane
—Main building—Annex.**

The Asylum for the Insane, London, consists of a centre building containing all necessary accommodation for patients, etc., and a kitchen, laundry, and engine-room built of brick and roofed with slate, situate some fifty feet to the rear of the middle of the centre building, and connected with it by a passage or covered way with brick walls about ten feet high and also roofed with slate and with a tramway to convey food from the kitchen to the southern portion of the centre building. A policy of insurance against fire insured the "main building."

Insurance, Fire—Continued.

Held, affirming the judgment of the Court of Appeal for Ontario and of the Divisional Court, that the policy covered the kitchen, laundry and engine-room.

Present.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Ætna Ins. Co. v. Attorney-General of Ontario.—June 8, 1890.—xviii. 707.

25. Evidence—Weight of—Admissibility—Grounds for admission urged at trial—New grounds cannot be taken on appeal.

See EVIDENCE, 51.

26. Policy—Description of premises—Reference to plan—Variance—*Falsa demonstratio non nocet*—Canvasser—Agency.

An insurance policy described the goods insured as stock, consisting of dry goods, etc., while contained in that one and a half story building occupied as a store-house, said building shown on plan on back of application as "feed-house," situate attached to wood-shed of assured's dwelling house. The plan referred to had been made by a canvasser for insurance, who had obtained the application, and the building on said plan marked "feed-house," did not in any respect conform to the description in the policy, but another building thereon answered the description in every way except as to the designation "feed-house." The goods insured were stored in this latter building and were burnt. The company refused to pay, alleging breach of a condition in the policy that no inflammable materials should be stored on the said premises, as well as misdescription of the building containing the goods insured. In an action on the policy it appeared that a barrel of oil was in the building marked "feed-house" at the time of the fire. The jury found a verdict for the plaintiff and a non-suit, moved for pursuant to leave reserved, was refused by the full court (the Supreme Court of New Brunswick).

Held, that the non-suit was rightly refused; that it was evident that the building in which the goods were stored was that intended to be described in the policy; that the building marked "feed-house" being detached from that in which the goods were was a suitable place for storing oil, which, therefore, was not a breach of the condition; that the case was a proper one for the application of the maxim *falsa demonstratio non nocet*, but if not the matter was one for the jury who had pronounced upon it.

Held, further, that the canvasser who secured the application could not be regarded as agent of the assured, but was the agent of the company which was bound by his acts.

Guardian Ins. Co. v. Connelly.—xx. 208.

27. Insurable interest—Property in goods—Construction of agreement—Statement in application—Warranty or representation—Breach of condition—Evidence.

By a contract in writing, M. agreed to cut and store a certain quantity and description of ice, the said ice houses and all implements to be the

Insurance, Fire—Continued.

property of P., who after the completion of the contract was to convey same to M.; the ice was to be delivered by M. on board vessels to be sent by P. during certain months; P. was to be liable to accept and pay for only good merchantable ice delivered and stored as agreed. The property on which the buildings for storing said ice were situate was leased to P. by the owner, the lease containing a covenant by the owner to grant a renewal to M. A bill of sale was made by M. to a third party of the buildings on said land. M. effected insurance on the whole stock of ice stored, and in his application to the question, "does the property to be insured belong exclusively to applicant, or is it held in trust or on commission, or as mortgagee?" He answered, "yes, to applicant." The application contained a declaration that the same was a just, full and true exposition of all the facts and circumstances in regard to the condition of the property so far as known to the applicant and so far as material to the risk, and it was to form the basis of the liability of the company.

The property insured was destroyed by fire and payment of the insurance was refused on the ground that the property belonged to P. and not to M. In an action on the policy, the defendants endeavoured to prove that other insurance on the same property had been effected by P., and set up a condition in the policy that in such case the company should only be liable to pay its rateable proportion of the loss. This condition was not pleaded, and the policies to P. were not produced, nor the terms of his insurance proved. Evidence was given, subject to objection as to its admissibility, that P. had effected insurance to cover advances made to M. on the ice, and had been paid his loss. The plaintiff obtained a verdict for the full amount of his policy, which was affirmed by the Supreme Court of New Brunswick *in banc*.

Held, affirming the decision of the Court below, that the whole property in the ice insured was in M.; that the clause in the agreement stating that the ice houses and implements were to be the property of P. meant that the buildings and implements only were to pass to P., as he was to convey the property vested in him by the agreement to M. on completion of the contract, and could not so convey the ice which M. was to deliver on board vessels, which he could not do unless it was his property.

Held, further, that the declaration in the application did not make M. pledge himself to the truth of the statements therein absolutely, but only so far as known to him and as material to the risk, and questions of materiality and knowledge were for the jury, who found them in favour of M.

Held, also, Strong, J., dissenting, that the declaration was not a warranty of the truth of the statements, but a mere collateral representation.

Per Strong, J.—It was a warranty, but as it was confined to matters within the knowledge of M. and material to the risk the result was practically the same.

Held, as to the further insurance, that the condition should have been pleaded, but if available without plea it was not proved; what evidence was given should not have been received.

Insurance, Fire—Continued.

Per Strong, J.—It was not shown that P.'s insurance was on the ice insured by M., who was not bound to deliver any specific ice under the contract.

Per Gwynne, J.—The damages should be reduced by the amount received by P.

North British and Mercantile Insurance Company v. McClellan.—xxi. 288.

Insurance, Life—Mistake as to amount insured—Premium—Parol evidence.

Action to recover the amount of a policy of insurance issued by the appellants for the sum of \$2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of \$168.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants, by their plea, alleged that the insurance had been effected for \$1,000 only, and that the policy had by mistake been issued for \$2,000; that as soon as the mistake had been discovered they had offered a policy for \$1,000, and that previous to the institution of the action they had tendered to the respondent the sum of \$832.97, being the amount due, which sum, with \$25.15 for costs (which had not been tendered) they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a \$1,000 policy.

Held, that the insurance effected was for \$1,000 only and that the policy had by mistake been issued for \$2,000.

The Aetna Life Insurance Co. v. Brodie.—v. 1.

2. Policy—37 V. c. 85 (O.)—Want of seal—Fraud—Pleadings—Power of courts of equity.

The seventh section of the statute incorporating the appellants, 37 V. c. 85 (Ont.), after specifying the powers of the directors enacts as follows: "but no contract shall be valid unless made under the seal of the company, and signed by the president or vice-president, or one of the directors, and countersigned by the manager, except the interim receipt of the company, which shall be binding upon the company on such conditions as may thereon be printed by direction of the board."

J. E. W. brought an action to recover the amount of a policy issued by the appellants in favour of her father.

The policy sued on was on a printed form and had the attestation: "In witness whereof, the London Life Insurance Company, of London, Ont., have caused these presents to be signed by its president, and attested by its secretary, and delivered at the head office in the city of London, etc."

Insurance, Life—Continued.

To a plea that the policy sued on was not sealed, and, therefore, not binding on the appellants, the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all as a valid policy, but the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal, or ordered to affix it.

Held, affirming the judgment of the Court of Appeal, that the setting up of "the want of a seal," as a defence was a fraud which a court of equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears; and therefore the respondent was entitled to the relief prayed as founded upon the facts alleged in her equitable replication. Ritchie, C.J., and Taschereau, J., dissenting.

London Life Insurance Co. v. Wright—v. 466.

3. *Insurable interest—Transfer—Wager policy—Payment of premiums.*

G. applied to respondents' agent at Quebec for an insurance on his life, and having undergone medical examination, and signed and procured the usual papers, which were forwarded to the head office at New York, a policy was returned to the agent at Quebec for delivery. G. was unable to pay the premium for some time, but L., at the request of the agent at Quebec, who had been entrusted with a blank, executed an assignment of the policy, paid the premium and took the assignment to himself. Subsequently L. assigned the policy, and the premiums were thenceforth paid by the assignee. Prior to G.'s death, the general agent of the company enquired into the circumstances and authorized the agent at Quebec to continue to receive the premiums from the assignee.

Held, Gwynne, J., dissenting, that at the time the policy was executed for G., he intended to effect a *bona fide* insurance for his own benefit, and, as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy, and the mere circumstance that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained an assignment, did not make it a wagering policy.

Yezina v. The New York Life Ins. Co.—vi. 30.

4. *Action on policy—New trial—Setting aside verdict—S. & E. C. A. ss. 20, 22.*

See JURISDICTION, 20.

5. *Executor or administrator, action by—Insurance company, agent of—Evidence, admissibility of—R. S. (N. S.) c. 96, s. 41.*

Action on a policy of life assurance. The defendants alleged in one of their pleas that the policy was never delivered to the assured, or to anyone

Insurance, Life—Continued.

on his behalf. F. A., the agent of the company, was called as a witness at the trial, and on being questioned as to conversations between himself and the assured, the evidence was objected to, and rejected by the judge as inadmissible under the R. S. (N.S.), c. 96, s. 41. A verdict was given for the plaintiff. A rule *nisi* to set aside this verdict was discharged by the Supreme Court of Nova Scotia, 2 Russ. & Ches. 570.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that the evidence was not inadmissible under the statute in question, and should not have been withheld from the jury. Appeal allowed with costs, and new trial ordered.

The Confederation Life Ass'n of Canada v. O'Donnell.—Feb. 11th, 1879.

6. *Policy, delivery of—Not countersigned, effect of—Premium, proof of payment of—Delivery of policy insufficient—Escrow.*

The same action as the one referred to in the preceding case (No. 5). The facts may be more fully stated as follows :

On an action on a policy, the appellant company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to the agent at Halifax, to receive the premium and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed :—
 "This policy is not valid unless countersigned by ———, agent at ———, countersigned this ——— day of ———. Agent." The agent, in his evidence, said he delivered the policy to W. O'D. (the party assuring) not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death, not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered the year up to the 1st October, 1873. W. O'D. died the 10th July, 1873. The case was tried before McDonald, J., without a jury, and he gave judgment in favour of respondent for \$3,000, the amount of the policy, and this judgment was confirmed by the Supreme Court of Nova Scotia.

On appeal to the Supreme Court of Canada, it was **Held**, *per* Ritchie, C.J., and Strong and Taschereau, JJ., (Fournier and Henry, JJ., dissenting), that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore the company was not liable.

Per Gwynne, J.—That the instrument was delivered as an *escrow* to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument

Insurance, Life—Continued.

of its original character of an *escrow*, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed.

The appeal was allowed and a new trial ordered.

Confederation Life Ass'n of Canada v. O'Donnell.—March 29, 1882—x. 92.

[In the report of this case, Taschereau, J., should have been reported as concurring in allowing the appeal, and the date of hearing should have been 7th November, 1881, and of judgment 29th March, 1882, respectively.]

7. *Condition in policy—Not to be valid until countersigned—Instructions to agent—Escrow—Admissibility of evidence—Entry in books of deceased—Not exclusively against interest—New trial.*

This was the same action on a policy of life insurance as the one referred to in the preceding cases (No. 5 & 6). The case having gone to trial for the third time, on the trial the learned judge admitted in evidence an entry in the books of his father made by the deceased holder of the policy, showing a payment to the agent of the company of an amount equal to the premium, which the evidence showed was paid by money given to deceased by his father. He also admitted the evidence of the agent, who had since died, taken at a former trial of the cause, to the effect that the premium was not paid, and that he would not countersign the policy until it was paid, and that the policy was only given to the deceased to enable him to examine it, and not as a duly executed policy. The jury found a verdict for the plaintiff, but stated, in answer to a question submitted by the court, that the agent had been instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia affirmed the verdict. On appeal to the Supreme Court of Canada,

Held, *per* Ritchie, C. J. and Gwynne, J., that the policy was only delivered to the agent as an *escrow*, and as it was never duly executed and delivered the company was not liable.

Per Strong, J.—That the memorandum as to countersigning was not a condition of the policy, and the plaintiff was not barred by non-compliance with its terms; but the evidence of the entry in the books of the deceased was improperly admitted, and there should be a new trial.

Per Fournier and Henry, JJ.—That the policy was properly executed and delivered, and as there was sufficient evidence to sustain the verdict independent of the evidence alleged to have been improperly admitted at the trial, the appeal should be dismissed.

Per Henry, J.—Under the present practice the court is bound to uphold a verdict if there is sufficient legal evidence to sustain it independently of evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. Strong, J., *contra*.

The court being thus divided in opinion a new trial was granted. Opinions expressed in *The Confederation Life Association v. O'Donnell*, (10 Can. S. C. R. 92), adhered to.

Confederation Life Ass. of Canada v. O'Donnell.—xiii. 218.

Insurance, Life—Continued.**8. *Memo. on margin of policy—Want of countersignature—Effect of—Condition precedent.***

This was the same action as the one referred to in Nos. 5. 6 and 7, preceding, where the facts will be found set out. The case having again gone down for trial, evidence was given of the payment of the premium, and rebutting evidence by the company that it had never been paid. The jury found that the premium was paid and the policy delivered to the insured as a completed instrument, and a verdict was entered for the plaintiff and affirmed by the Supreme Court of Nova Scotia.

Held, affirming the judgment of the court below, (21 N. S. Rep. 169), Sir W. J. Ritchie, C.J., and Gwynne, J., dissenting, that the necessity of countersigning by the agent was not a condition precedent to the validity of the policy, and the jury having found that the premium was paid their verdict should stand.

The judgment on the former appeals in this case was, on this point, substantially adhered to. See 10 Can. S. C. R. 92, (*Ante* No. 6), and 18 Can. S. C. R. 218, (*Ante* No. 7).

Present: Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau and Gwynne, JJ.

Confederation Life Association of Canada v. O'Donnell.—

Mar. 18, 1889.—xvi. 717.

9. *Accident policy—Condition—Voluntary exposure to unnecessary danger—Practice—Extending time for appealing.*

The plaintiff (appellant) brought an action to recover upon a policy of insurance effected by the respondents upon the life of her deceased husband, J. N., who met his death during the currency of the policy from being run over by a train of cars upon one of the lines of the Northern Railway through the company's yard at Toronto. In answer to the plaintiff's claim the respondents, amongst other defences, by their fourth plea invoked a condition to which the policy sued on was subject, to wit:—"No claim shall be made under this policy when the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure." The uncontradicted evidence was that the deceased was killed by the train coming against the vehicle in which he was driving alone on a dark night in what was called a network of railway tracks in the company's station yard at Toronto, at a place where there was no roadway for carriages.

Held, affirming the judgment of the court below, (7 Ont. App. R. 570), that the undisputed facts established by the plaintiff shewed "that the deceased came to his death in consequence of voluntary exposure to unnecessary danger," and that, therefore, respondents were entitled to a non-suit.

[In this case the Court of Appeal for Ontario held that an appeal will not lie to such court from the order of a judge of that court extending the time for appealing to the Supreme Court of Canada. See 9 Ont. App. R. 54.]

Neill v. Travellers' Ins. Co.—23rd June, 1884.—xii. 55.

Insurance, Life—Continued.

10. *For benefit of another—Wager policy—14 Geo. III. c. 48.*

The statute 14 Geo. III., c. 48, enacts: 1. That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons or on other event or events whatever wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning of this Act shall be null and void to all intents and purposes whatsoever. 2. That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwritten. 3. That in all cases when the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

Held, affirming the judgment of the court below, that this statute never was intended to prevent a person from effecting a *bona fide* insurance on his own life, and making the sum insured payable to whom he pleases, such insurance not being "by way of gaming or wagering" within the meaning of the first section of the Act.

Held, also, that section 2 of the said Act applies only to a policy on the life of another, not to a policy by a man on his own life.

North American Life Ass. Co. v. Craigden.—xiii. 278.

11. *Application for policy—Declaration by assured—Basis of contract—Warranty—Misdirection.*

An application for a life insurance policy contained the following declaration after the applicant's answers to the questions submitted:—"1, the said George Miller, (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association until the first premium thereon shall be paid to a duly authorized agent of the association, during my lifetime and good health. I (the party in whose favour the assurance is granted) do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association."

Insurance, Life—Continued.

Held, affirming the judgment of the court below, that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to the best of my knowledge and belief."

At the trial the jury were charged that if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant, their verdict should be for the plaintiffs.

Held, a proper direction.

Confederation Life Ass. v. Miller.—xiv. 380.

12. Life Insurance—Declarations and statements in application—Intemperate habits—Increase of risk—Promissory warranty—Locus standi—Art. 153, C. C.

An application for life insurance signed by the applicant contained in addition to the question and answer, viz.:—Are your habits sober and temperate? A. Yes, an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated that "if any of the declarations or statements made in the application of this policy upon the faith of which this policy is issued shall be found in any respect untrue, in such case the policy shall be null and void."

On an action on the policy by an assignee, it was proved that the insured became intemperate during the year preceding his death, but medical opinion was divided as to whether his intemperate habits materially increased the risk.

Held, on the merits *per Ritchie, C.J.*, and *Strong, J.*, (*Fournier and Henry, JJ., contra.*) that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract.

The appellant's interest in the policy was as assignee of *Dame M. H. B.*, the wife of one *Charles L.*, to whom the insured had transferred his interest in the policy on the 27th October, 1876.

Held, *per Strong, Taschereau and Gwynne, JJ.*, that the appellant, had no *locus standi*, there being no evidence that *M. H. B.* had been authorized by her husband to accept or transfer said policy.

Boyce v. The Phoenix Mut. Life Ins. Co.—xiv. 723.

13. Death caused by negligence of railway company—Insurance on life of deceased—No reduction of damages for.

See RAILWAYS AND RAILWAY COMPANIES, 46.

Insurance, Life—Continued.**14. Mutual company—Bond of membership—Warranty—Concealment of facts—Misstatement.**

On an application for insurance in a mutual assessment insurance society the applicant declared and warranted that if in any of the answers there should be any untruth, evasion or concealment of facts, any bond granted on such application should be null and void. In an action against the company on a bond so issued, it was shown that the insured had misstated the date of his birth, giving the 19th instead of the 23rd of February, 1835. as such date; that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the company contended that it was, in fact, a severe attack; that he had stated that he was in "perfect health" at the date of the application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose, and that the attack of apoplexy, which he had admitted occurred five years before the application, had in fact occurred within four years. The trial judge found that the misstatement as to date of birth was immaterial, as it could not have increased the number of years on which the premiums were calculated; that the attack of apoplexy was a slight, not a severe attack; that the applicant was in "good" if not "perfect" health when the application was made; that the bleeding at the nose to which the insured was subject, was not a disease and not dangerous to his health; but that the misstatement as to the time of the occurrence of the attack of apoplexy was material, and on this last issue he found for the society, and on all the others for the plaintiff. The court *en banc* reversed this decision and gave judgment for the plaintiff on all the issues, holding that as to the issue found by the trial judge for the society, there was a variance between the plea and the application which prevented the society from taking advantage of the misstatement. On appeal to the Supreme Court of Canada:

Held, Gwynne and Patterson, JJ., dissenting, that the decision of the court *en banc*, 20 N. S. Rep. 347, was right, and should be affirmed.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Mutual Relief Society of N. S. v. Webster.—March 18th, 1889—xvi. 718.

15. Application for—Reference to application in policy—Warranty—Misstatement—R. S. C. c. 124.

The bond of membership in an insurance society insured the members holding it "in consideration of statements made in the application herefor, etc., and in a declaration annexed to the application the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue.

Held, that the application was a part of the contract for insurance and incorporated with the bond.

The said declaration warranted the truth of the answers to the questions and of the statements therein, and agreed that if any of them were not true, full and complete, the bond should be null and void. One of the questions to

Insurance, Life—Continued.

be answered was: "Have you ever had any of the following diseases? Answer opposite each yes or no." The names of the diseases were given in perpendicular columns, and at the head of each column the applicant wrote "no," playing under it and opposite the disease named marks like inverted commas. On the trial of an action to recover the insurance on a bond issued pursuant to this application it was found that the applicant had had a disease opposite to which one of these marks had been placed.

Held, affirming the judgment of the court below, that whether the applicant intended this mark to mean "no" and thus deny that he had had such disease, or intended it as an evasion of the question, the bond was void for want of a true answer to the question.

[In this case it was argued that the Insurance Act, R. S. C. c. 124, applied to the defendant company, and that the benefit of the application could not be claimed as it was not contained in nor endorsed on the policy as required by sections 27 and 28 of the statute; but the court did not consider it necessary to determine the point. See judgment of Gwynne, J., at p. 340].

Fitzrandolph v. The Mutual Relief Society of Nova Scotia.—xvii. 333.

16. *Unconditional policy—Misrepresentations—Effect of—Indication of payment—Return of premium—Additional parties to a suit—R. S. C. c. 124, ss. 27 & 28—Arts. 2487, 2488, 2585, C. C.*

An unconditional life policy of insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that if any misrepresentation was made by the applicant, or untrue answers given by him to the medical examiner of the company, the premiums paid would become forfeited and the policy be null and void. Upon the death of the assured, the person to whom the policy was made payable sued the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that insured's was a life not insurable.

Held, 1st, that the policy was thereby made void, *ab initio*, and the insurer could invoke such nullity against the person in whose favour the policy was made payable, and was not obliged to return any part of the premium paid.

2nd, that the statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of ss. 27 & 28, R. S. C. c. 124, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Parliament of Canada, which point it was not necessary to decide.

3rd, that the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation; Art. 1174, C. C., and the provisions contained in Art. 1180, C. C. are not applicable in such a case.

Insurance, Life—Continued.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to the cause.

Yenner v. Sun Life Insurance Co.—xvii. 394.

17. Deposit by insurance company in bank under provisions of Insurance Act, R. S. C. c. 124—Insolvency of bank—Claim of Crown to priority over other creditors.

See CROWN, 21.

18. *Accident insurance—Immediate notice of death—Waiver—External injuries producing erysipelas—Proximate or sole cause of death.*

An accident policy issued by the appellants, was payable in case, *inter alia*, "the bodily injuries alone shall have occasioned death within ninety days from the happening thereof, and provided that the insurance should not extend to hernia, etc., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The policy also provided that in the event of any accident or injury for which claim may be made under the policy, immediate notice must be given in writing, addressed to the manager of the company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice, shall invalidate all claims under the policy.

On the 21st March, 1886, the insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound which appeared at first to be a slight one was complicated by erysipelas, from which death ensued on the 13th of April following.

The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipt of proofs of death which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability.

At the trial there was conflicting evidence as to whether the erysipelas resulted solely from the wound, but the court found on the facts that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court:—

Insurance, Life—Continued.

Held, reversing the judgment of the court below, Fournier and Patterson, JJ., dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this regard.

Per Strong, Fournier and Patterson, JJ., that the external injury was the proximate or sole cause of death within the meaning of the policy.

Accident Insurance Company of North America v. Young.—xx. 280.

19. **Assessment of Life Assurance Co.**—Statutory form of statement to assessors—Departure from by agent—52 V. c. 27, s. 125 (N.B.). xxi. 674..

See ASSESSMENT AND TAXES, 27.

Insurance, Marine.—Warranty—"Vessel to go out in tow"—Construction of.

The appellants issued a marine policy of insurance at Toronto, dated the 28th November, 1875, insuring in favour of the respondent \$8,000 upon a cargo of wood goods laden on board of the barque "Emigrant," on a voyage from Quebec to Greenock. The policy contained the following clause:—"J. C., as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may or shall appertain, in part or in all, doth make insurance and cause three thousand dollars to be insured, lost or not lost, at and from Quebec to Greenock, vessel to go out in tow." The vessel was towed from her loading berth in the harbour into the middle of the stream near Indian Cove, which forms part of the harbour of Quebec, and was abandoned with cargo by reason of the ice four days after leaving the harbour and before reaching the Traverse.

Held, Fournier and Henry, JJ., dissenting, that the words "from Quebec to Greenock, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of Quebec on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty.

Per Ritchie, C.J.—The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of Quebec, if any existed in relation thereto.

Per Gwynne, J.—The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the Traverse, but ordinarily at the date of the departure of the plaintiff's vessel at least as far as the Traverse.

The Provincial Ins. Co. of Canada v. Connolly.—v. 258.

Insurance, Marine—Continued.**2. Policy—Total loss—Sale by master—Notice of abandonment.**

T., respondent, was the owner of a vessel called the "Susan," insured for \$800 under a valued time policy of marine insurance, underwritten by G., the appellant and others. The vessel was stranded and sold, and T. brought an action against G. to recover as for a total loss. From the evidence, it appeared that the vessel stranded on the 6th July, 1876, near Port George, in the county of Antigonish, adjoining the county of Guysboro', N. S., where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, the vessel was advertised for sale on the following day, and sold on the 11th July for \$105. The captain did not give any notice of abandonment and did not endeavour to get off the vessel. The purchasers immediately got the vessel off, etc., had her made tight, and taken to Pictou and repaired, and they afterwards used her in trading and carrying passengers.

Held, on appeal, that the sale by the master was not justifiable, and that the evidence failed to show any excuse for the master not communicating with his owner so as to require him to give notice of abandonment, if he intended to rely upon the loss as total.

Per Gwynne, J.—It is a point fairly open to enquiry in a court of appeal, whether or not, as in the present case, the inferences drawn from the evidence by the judge who tried the case without a jury, were the reasonable and proper inferences to be drawn from the facts.

Gallagher v. Taylor.—v. 368.

3. Policy, condition in, as to default in payment of premium, effect of—Premium note, guarantee of, in case of insolvency—Condition precedent—Reference to arbitration—Award, effect of.

W. et al. effected in A. M. Ins. Co., a policy of insurance on a ship. The policy among other clauses contained the following: "In case the premium, or the note, or other obligation given for the premium, or any part thereof, should be not paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall be entitled to recover for loss or damage which may have occurred before such fault. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business, or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." There was also in the policy an arbitration clause, by which arbitrators were to decide any difference which might arise between the company and the insured "as to the loss or damage, or any other matter relating to the insurance," in accordance with the terms and conditions of the policy and the laws of Canada, and the obtaining of the decision of the arbitrators was to be a condition precedent to the maintaining

Insurance, Marine—Continued.

of an action by the insured against the company. *W. et al.* gave a promissory note for the premium, which was not yet due when they became insolvent; and C., the respondent was appointed assignee. A guarantee was then given, and accepted by the company as a satisfactory security for the premium. The note became due on the 30th September, 1878, and was not paid, but remained overdue and unpaid at the date of loss, on the 12th October, 1878. After the loss the matters in dispute arising out of the policy were submitted to three arbitrators, who awarded \$5,769.29. An action was then brought on the policy, the declaration containing a count on the award.

Held, affirming the judgment of the court below. 1. That the premium having, on the insolvency of the insured, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect, and did not become void on non-payment of the premium note at maturity. (Strong, J., dissenting.)

2. That the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be bad from any mistake of law or otherwise.

Anchor Marine Insurance Co. v. Corbett.—ix. 78.

4. Policy—Construction of—Trading voyage—Insurable interest.

The respondents (plaintiffs), by an arrangement with M., who had chartered the schooner "Mabel Claire" for a trading voyage from Nova Scotia to Labrador and back, were to furnish the greater part of the cargo, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advance, and pay over any balance remaining to S. and others. In trading on the voyage S. and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding \$6,000, and after having done so and upon the day on which the vessel sailed from Halifax, effected with the appellants (defendants) the policy sued upon, and an extract from which is as follows:—"Rumsey, Johnson & Co. have this day effected an insurance to the extent of \$2,000, on the undermentioned property, from Halifax to Labrador and back to Halifax on trading voyage. Time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner "Mabel Claire," whereof Mouzar is master, this present voyage. Loss, if any, payable to Rumsey, Johnson & Co. Said insurance to be subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed on the back hereof. Description of goods insured, merchandise under deck, amount \$2,000, rate 5 per cent., premium \$100, to return two (2) per cent., if risk ends 1st October, and no loss claimed; additional insurance of \$5,000, warranted free from capture, seizure and detention, the consequences of any attempt thereat." Against the

Insurance, Marine—Continued.

respondents right to recover it was contended that they were merely unpaid vendors and had no insurable interest, and that goods previously put on board at Liverpool, N. S., were not covered by this policy, and that it was not to cover the return cargo.

Held, affirming the judgment of the court below, discharging a rule *nisi* to set aside a verdict for the plaintiffs, that the policy covered not only goods put on board at Halifax, but all the merchandise under deck shipped in good order on board said vessel during the period mentioned in the policy.

Held, also, that there was sufficient evidence to show that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel.

Merchants' Marine Insurance Co. v. Rumsey.—ix. 577.

5. *Voyage policy—Mortgagee who assigns as collateral security has an insurable interest—Total loss—Right to recover—Notice of abandonment by mortgagee—Constructive total loss.*

While the barque "Charley" was at Cochin, on or about the 12th April, 1879, the master entered into a charter party for a voyage to Colombo, and thence to New York by way of Alippee. The vessel sailed on the 22nd April, 1879, and arrived at Colombo, which place she left on the 13th May, and while on her way to Alippee she struck hard on a reef and was damaged and put back to Colombo. The vessel was so damaged that the master cabled to the ship's husband at New York on the 23rd May, and in reply received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there, and Bombay, 1,000 miles distant, was the nearest port. After proper surveys and cargo discharged, on the 10th June, the vessel was stripped and the master sold the materials in lots at auction. On the 21st May the respondent, a mortgagee of $\frac{1}{4}$ in the vessel, which he had assigned to the Bank of Nova Scotia by endorsement on the mortgage, as a collateral security for a pre-existing debt to the Bank of Nova Scotia, being aware of the charter from Cochin to New York, insured his interest with the appellant company, the nature of the risk being thus described in the policy: "Upon the body, etc., of the good ship or vessel called the barque 'Charley' beginning the adventure (the said vessel being warranted by the insured to be then in safety), at and from Cochin *via* Colombo and Alippee to New York."

To an action on the policy for a total loss, the defendants pleaded, *inter alia*, 1st, that the plaintiff was not interested; 2nd, that the ship was not lost by the perils insured against; 3rd, concealment. A consent verdict for \$3,206 for plaintiff was taken, subject to the opinion of the court upon points reserved to be stated in a rule *nisi*, and upon the understanding and agreement that everything which could be settled by a jury should, upon the evidence given, be presumed to be found for the plaintiff.

Held, 1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance.

Insurance, Marine—Continued.

2nd. That the fact of the plaintiff having assigned his interest as a collateral security to a creditor did not divest him of all interest so as to disentitle him to recover.

3rd. That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary.

Per Strong, J.—A mortgagee, upon giving due notice of abandonment, is not precluded from recovering for a constructive total loss.

Anchor Marine Insurance Co. v. Keith.—ix. 483.

6. *Total or constructive total loss, what constitutes—Notice of abandonment not accepted by underwriters—Right to abandon—Sale by master.*

C., as assignee of W., was insured upon the schooner "Janie R." to the amount of \$2,000 by a voyage policy. On the 14th February, 1879, the "Janie R." which had been in the harbour of Shelbourne since the 7th of February, left with a cargo of potatoes to pursue the voyage described in the policy, but was forced by stress of weather to put back to Shelburne, and on the morning of the 15th she went ashore, when the tide was about its height. On the 17th notice of abandonment was given to the defendants (appellants) and not accepted, and on the 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with the assistance of an American vessel that was in the harbour, and by the use of casks for floating her (appliances which the master did not avail himself of), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after having been repaired, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for \$1,560. In an action brought on the policy against the defendant company, tried before a judge without a jury, a verdict was given in favour of plaintiff for \$1,918. which verdict was sustained by the Supreme Court of Nova Scotia.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the courts below, 1. That the sale by the master was not justified in the absence of all evidence to show any "stringent necessity" for the sale after the failure of all available means to rescue the vessel.

2. That the undisputed facts disclosed no evidence whatever of an actual total loss, and did not constitute what in law could be pronounced either an absolute or a constructive total loss.

Per Strong, J.—The right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given.

Providence Washington Insurance Co. v. Corbett.—ix. 256.

Insurance, Marine—Continued.**7. Marine insurance—Policy, cancellation of—Premium, retention of portion of.**

The plaintiff's, by their agents in Pictou, insured in the St. Lawrence Insurance Association, of which defendant was the broker and an underwriter, the sum of \$2,000 on their schooner "Nimrod" for twelve months. In a written application were the words, "insurance elsewhere not to exceed \$2,000." The policy was afterwards issued, dated 25th October, 1870, without any reference to this condition. On the day the application was made the plaintiffs insured a further sum of \$2,000 on the schooner in the Mutual Insurance Association of Pictou. In November afterwards another sum of \$2,000 was insured in the Union Marine Insurance Company at Halifax. After all these insurances had been effected, the schooner proceeded on her voyage and was, as was long afterwards ascertained, abandoned at sea as a total wreck on the 19th February, 1871.

On the 20th February, 1871, the defendants' association, none of the parties having had any intimation of the loss, cancelled their policy on account of the insurance in the Mutual Marine Insurance Company at Halifax, charging the plaintiffs premium up to that date and remitting the portion payable after that date.

In an action brought on the policy, the Supreme Court of N. S. directed judgment to be entered for defendants.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that the defendants could not be allowed to contend that the cancellation operated, not from the 20th February, 1871, up to which date the premium was charged, but from November previous. Appeal allowed with costs.

McDonald v. Doull.—24th February, 1879.

8. Promissory representation in application—Coasting voyages—Time policy.

The policy sued on was a time policy issued on a slip or application containing a statement in these words: "Voyage at and from date to 31st December, coasting principally Canso to Halifax, using Prince Edward Island and Newfoundland." In the policy the exceptions on the time risks were as follows: "Prohibited from the River and Gulf of St. Lawrence and ports in Newfoundland, and between the 1st November and 1st May." Sealing voyages and voyages to Greenland and Iceland were also excepted, and "not to use the ports of Schooner Pond, Blockhouse Mines and Chimney Corner, except during the months of June, July and August, the use of such waters not to vitiate this policy, except during the time such waters are used." The vessel was lost on a voyage from Baltimore to St. Thomas.

The Supreme Court of Nova Scotia held that notwithstanding the representation in the slip, the insured was justified in sailing wherever the policy permitted. (4 Russ. & Geld. 50).

Insurance, Marine—Continued.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the court below, that, taking the slip and policy together, a perfectly consistent contract of assurance could be made out, namely, a contract to assure the vessel for the time named, provided she was confined to coasting voyages, and did not, whilst so employed, use any of the prohibited waters. Henry, J., dissenting.

Appeal allowed with costs.

McKenzie v. Corbett.—19th June, 1883.

9. Total loss—Notice of abandonment—Waiver.

On a voyage from Porto Rico to New Haven, respondents' vessel sustained damage and put into St. Thomas. A survey was held by competent persons named by the British consul, and according to their report the cost of putting her in good condition would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised and sold vessel, and purchaser had her repaired at a cost much less than the report, and sent her to sea.

Held, that there was no evidence to justify the jury in finding that the vessel was a total loss.

Owners of vessel gave notice to agent of underwriters that they would abandon, which agent refused to accept. Owners telegraphed to Captain that they had abandoned and for him to proceed under the best advice.

Held, that this act of telegraphing to the Captain did not constitute a waiver of the notice of abandonment. *See* 23 N. B. R. 160.

Millville Mutual Mar. and Fire Ins. Co. v. Driscoll.—xi. 183.

10. Concealment of material facts—Policy void.

The appellant (defendant) is a member of an insurance association doing business at Halifax, known as the Halifax Marine Insurance Association.

On the 13th August, 1880, the respondent company (plaintiffs) through J. Scott Mitchell, their agent, applied to the association for insurance on the cargo of the steamship "Waldensian," on a voyage from Montreal to Glasgow via port or ports, and the risk was accepted the same day by the appellant and other underwriters, but no policy was issued or premium paid at the time.

The "Waldensian" left Montreal on the 11th August, 1880; she got aground that afternoon about four o'clock, but succeeded in getting off the same day and proceeded to Quebec, where she arrived about six o'clock, leaking badly, and was there grounded to prevent further damage to cargo.

The respondent company knew on the 12th day of August of the accident to the steamship, but this fact was not disclosed to the underwriters when the insurance was applied for on the 13th, the day following.

The appellant became aware of the accident a day or two after the application for insurance, and a policy was after that issued to respondent company, bearing date the 13th August, 1880 (the date of the application), and the

Insurance, Marine—Continued.

premium settled in account with the broker of the association, of which appellant was a member.

Appellant contended there was no evidence whatever that the appellant, or any of the underwriters, or their broker, knew at the time that the policy was issued or premium paid that the accident was known to the respondent company at the time the insurance was effected, and concealed from the underwriters.

This action was brought to recover for damage done to the cargo by the leaking of the steamship in consequence of her getting on shore as above stated.

The appellant pleaded among other things, that the respondent company concealed from appellant a fact known to respondent and material to the risk, and unknown to the appellant, viz.: that the steamship had been on shore after leaving Montreal.

The respondent replied that after appellant became aware of the facts alleged in the said pleas, he took the premium and issued the policy.

The cause was tried before Mr. Justice Rigby, at Halifax, on 7th Nov., 1883, who found that when the insurance was applied for, and the contract therefor completed, the respondent company was aware of the facts above stated, and concealed them from appellant, also that they were not then known to appellant, and were material to the risk. He also found that before the policy was issued or premium paid the appellant became aware of said facts, and elected to treat the contract as binding, and he found a verdict for the plaintiffs (the respondents) for the amount claimed.

A rule *nisi* was taken to set aside this verdict, which was argued before the court during the following term.

This rule *nisi* was discharged by the court, Judge Weatherbe, dissenting. (See 5 R. & G. 322.)

A rule absolute discharging the rule *nisi* was granted on the 22nd day of April, 1884, from which rule the appellant, Allison Smith, appealed to the Supreme Court of Canada.

Held, that the evidence showed that at the time of the payment of the premium the appellant did not know that the accident was known to the respondent company, and the policy therefore void for concealment of material facts, and there could be no waiver of the omission to communicate the information material to the risk, for the appellant could not waive that which he did not know.

Appeal allowed with costs.

Smith v. The Royal Canadian Insurance Co.—18th November, 1884.

11. *Condition of policy—Not to load more than registered tonnage with stone, etc., without agent's consent—Loading with phosphate rock—Evidence of consent by agent—Proof of contract—Prior insurance.*

A voyage policy on the plaintiff's vessel "Pretty Jemima," contained, *inter alia*, the following clauses:—"Warranted not to load more than regis-

Insurance, Marine—Continued.

tered tons with stones, marble, lead, ores or brick, without the consent of the agent of the Providence Washington Insurance Company, of Providence. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy then the said Providence Washington Insurance Company, of Providence, shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby assured."

In an action on the said policy, it appeared that the vessel was loaded with phosphate rock, and the plaintiff gave evidence of a conversation with the company's agent in which the latter wanted to charge more premium than on a previous policy, because the vessel was going to carry phosphate." He also cautioned plaintiff about loading the vessel; how to lay the floor so as to distribute the weight over the ship. The plaintiff's evidence on this matter closes as follows: "Ranney (the agent) said I could load down to the mark, the load line, same as if loading coal." It also appeared that there was \$1,100 prior insurance on one-eighth of the vessel, which plaintiff had bought, but of which he had never received the title.

Held, affirming the judgment of the Supreme Court of New Brunswick, Gwynne, J., dissenting, that the agent's consent had been obtained to the loading of the vessel beyond her registered tonnage, and there was consequently no breach of the above condition of the policy.

Held, also, that the defendants were liable, up to the amount insured, only for so much of the assured value as was not covered by the prior insurance of \$1,100.

Per Gwynne, J.—That the consent of the agent should have been alleged by the plaintiff in his pleading, and, not having been so alleged, could not be set up as an answer to the defendant's pleas. That the jury should have been requested to find whether or not phosphate rock was stone within the meaning of such condition, and that there should be a new trial to have such a finding by the jury.

The policy was signed by Ranney, as the company's agent; he issued and countersigned it as agent, received the premium and acted throughout as such agent, and was so recognized by the president of the company.

Held, that this was sufficient in the first instance, if uncontradicted, to justify the jury in finding that Ranney was the agent of the company.

Robertson v. Provincial Insurance Company, 3 All. N. B. 379 followed.

Appeal dismissed with costs.

Providence Washington Insurance Co. v. Chapman.—12th January, 1885.

12. *Policy to be countersigned by agent—Proof of agency.*

A policy of insurance on the respondent's vessel contained the following reservation: "But this policy shall not be valid unless countersigned by Henry R. Ranney, the said company's duly authorized agent, at his office in St. John, N.B." The policy was not countersigned by Ranney, and in an

Insurance, Marine—Continued.

action thereon, the respondent gave evidence to show that it was issued by Ranney and sent by him, as directed by the respondent, to a person in Nova Scotia. A verdict was given for the plaintiff at the trial, and the company moved for a non-suit on the ground, *inter alia*, that the policy was invalid on account of not being so countersigned. The non-suit was refused.

On appeal to the Supreme Court of Canada, **Held**, Fournier and Henry, JJ., dissenting, that the appeal must be allowed and a non-suit entered.

The policy, as set out in the plaintiff's declaration, contained a stipulation that the vessel was not to load more than register tonnage with stone, ores, &c. The defendants pleaded to this count that she did load more than her register tons with stone or ores, namely, phosphate rock, contrary to such condition. The plaintiff replied that phosphate rock was not stone or ore within the meaning of such condition; the defendants demurred to the replication, and, on argument on the demurrer, the replication was held good. 19 N. B. Reps. (3 P. & B.) 28.

The Delaware Mutual Insurance Co. v. Chapman.—16th February, 1885.

13. Agreement to keep ship insured to amount of advances.

See AGREEMENT, 10.

14. *By ship's husband, who is mortgagee—For the benefit of all concerned — Authority — Ratification — Concealment of material facts.*

A ship's husband, who held a power of attorney from the owners authorizing him to insure on their behalf, and who was also a mortgagee of the vessel, insured "for the benefit of all concerned," and the insurance was accepted by the owners. When the insurance was effected the vessel was sailing under the Haytien flag, and neither that fact, nor the fact of the insured having a mortgage interest, was communicated to the underwriters. The vessel was lost and the insured realized more than the amount of the mortgage from a prior insurance. The defendant, one of the underwriters, resisted payment on the ground of such prior insurance covering all the interest of the insured, and also of concealment of the above facts.

Held, affirming the judgment of the court below, that the underwriters were liable, the owners having authorized, or subsequently ratified, the insurance effected by the ship's husband, who was under no obligation to disclose his individual interest, in a policy for the benefit of all concerned, nor to disclose the nationality of the vessel, there being no representation or warranty required respecting it by the policy, and no circumstances within his knowledge attaching to the national character of the vessel exposing her to detention and capture.

West v. Seaman.—16th February, 1885.

Insurance, Marine—Continued.**15. Amendment—Constructive total loss of ship—Sale of—Facilities for making repairs.**

In the course of her voyage, on Saturday, the 3rd August, 1882, the "John D. Tupper" went ashore on Phinney's Point, on the Bay of Fundy shore, in a very dangerous position and was much injured. An anchor was got out ready for the tide. When the tide came in the pumps were sounded and there were fourteen inches of water. Half an hour after the first sounding there were three or four feet of water, but by the aid of the kedge anchor and starboard anchor the vessel was hove off and floated and anchored. The witness who details this, says: "I piloted her up to Port Williams; I was at the wheel; we made sail and thought she would fill; the pumps were going all the time; we did not set the upper sail; I kept as close to the shore as I could in case she filled and rolled over with her deck-load; at Port Williams she ran aground about 100 feet from the breakwater; we could not swing her closer; she was then lying on the beach of the Bay of Fundy; some of the deals of the deck-load were thrown over at Phinney's Point."

At Port Williams the vessel floated once every day. The master on Monday discharged the cargo deck-load and hauled the vessel into the pier.

There were no facilities for repairing vessels of this class at Port Williams, but there were near at hand, viz., at the port of St. John, where she could be, and actually was, repaired, and which place, one of the witnesses says, could be seen on a fine day from Port Williams; but the captain appears to have made no efforts whatever to take the vessel to St. John, or to procure a tug from St. John to aid him in doing so, if such was deemed necessary, or to have made any enquiries in reference thereto, but on the 20th August, notified the shipper that the voyage was at an end. The vessel was sold at auction (a Mr. Troop, one of the mortgagees acting as auctioneer) and transferred by bill of sale dated the 4th September to the purchaser, who thereupon, immediately after the sale, without the slightest apparent difficulty, with her original crew, sailed her to St. John, and there repaired her, and in the course of four or five weeks sent her in a seaworthy condition on a voyage to the West Indies with a cargo of shooks.

Held, in view that there never was any pressing necessity for the sale, or any time when the ship was unnavigable without any reasonable hope of repair, that the damage never was so great that the owner could not have put her in a state of repair necessary for pursuing the voyage at a convenient and suitable place, and at an expense less than the value of the ship, and that the cargo was not in a perishable condition, but in a place of safety, there was no ground for saying there was either a total or a constructive total loss, or that there ought to have been a loss of the voyage; and therefore no question of abandonment arose.

Appeal dismissed with costs.

Fatch v. Pitman.—16th February, 1885.

Insurance, Marine—Continued.**16. Constructive total loss—Sale of vessel—Repairs—Value after.**

In an action to recover insurance on freight, it appeared that on the voyage, which was from Boston to St. Pierre, the vessel sprung a leak and put into Glasgow harbour near Cape Canso, where a survey was held; some repairs were made, and, in accordance with the recommendation of the surveyors, she proceeded to Port Hawkesbury for further repairs. On the day she left Port Hawkesbury she went ashore, and when the tide ebbed, fell over on her side; part of the cargo was damaged and sold, and the rest taken by the Boston underwriters; the vessel sustained further damage while lying on the shore. The captain made no *bona fide* efforts to get her off, and after being several times advertised she was finally sold for \$140; she was got off at a cost of \$70, by the purchasers, repaired for considerably less than her value and sailed for two years, when she was again sold for \$1,800. In the policy she had been valued at \$1,500, and two years before had sold for \$2,000.

Held, reversing the judgment of the court below, that the vessel was not a constructive total loss. *Providence Washington Ins. Co. v. Corbett*, 9 Can. S. C. R. 256, approved.

The Providence Washington Ins. Co. v. Almon.—17th February, 1885.

17. Warranted no other insurance—Construction of.

Action upon a policy of insurance in the usual form upon the schooner "Smiling Waters." The application contained the words, written on its face, "no other insurance," and the policy issued on the application so made contained the words, "warranted no other insurance." The policy was issued in favour of James Butler & Co., on account of whom it might concern. The declaration was in the usual form and averred interest in the persons composing the firm of James Butler & Co., and Henry Walfield, or some or one of them.

The defence was rested solely on the warranty, which, the defendants contended, meant that there should be no other insurance on the vessel during the continuance of the risk.

It was admitted upon the trial, that after the policy was issued, the Henry Walfield mentioned, being indebted to one Sperry for assistance in building said vessel, instructed Sperry to effect insurance on the vessel to cover his debt, which Sperry did for \$400 with J. E. and others, on behalf of whom it might concern, and both policies were in full force at the time of the loss.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the words "no other insurance," and "warranted no other insurance," meant that there should be no other insurance on the vessel during the continuance of the risk.

Appeal dismissed with costs.

Butler v. Merchants' Marine Insurance Co.—17th February, 1885.

Insurance, Marine—Continued.**18. Voyage policy—Sailing directions—Time of entering Gulf of St. Lawrence—Attempt to enter.**

In an action on a voyage policy containing this clause "warranted not to enter, or attempt to enter, or to use the Gulf of St. Lawrence, prior to the tenth day of May, nor after the thirteenth day of October (a line drawn from Cape North to Cape Ray, and across the Strait of Canso, to the northern entrance thereof, shall be considered the bounds of the Gulf of St. Lawrence seaward)," the evidence was as follows:—The captain says: "The voyage was from Liverpool to Quebec, and ship sailed on April 2nd. Nothing happened until we met with ice to the southward of Newfoundland, shortened sail and dodged about for a few days trying to work our way around it. One night ship was hove to under lower main-topsail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in this ice three or four hours; laid to all the next day; could not get any further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log book showed that the ship got into the ice on the 7th May, and an expert examined at the trial swore that from the entries in the log book of the 6th, 7th, 8th and 9th of May, the captain was attempting to enter the Gulf of St. Lawrence. A verdict was taken for the plaintiff by consent, with leave for the defendants to move to enter a non-suit or for a new trial, the court below to have the power to mould the verdict, and also to draw inferences of fact the same as a jury. The Supreme Court of New Brunswick sustained the verdict.

Held, reversing the judgment of the court below (24 N.B.R. 39) Henry, J., dissenting, that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the gulf contrary to such clause.

Taylor v. Moran.—xi. 347.

19. Constructive total loss—Perils not insured against—Abandonment—Arts. 2538, 2541, 2544, C. C. (P.Q.).

On the 28th September, 1875, a steam barge, loaded with sand, sank while at anchor near Chateauguay, in the river St. Lawrence. The barge was raised and floated within a week after the disaster. It was shown that on the star-board side there was an auger hole in the bilge of the barge which had been plugged up with a little wooden plug, and that the plug had come out. The vessel was raised by the insurers under the salvage clause of the policy. On the first October, there was a formal protest, made at the request of the master and officers of the barge, setting forth all the details of the wreck. On the 6th December, 1875, the insurers were notified that the vessel was abandoned, the notice of abandonment concluding with the words: "It is hardly necessary for me, after your taking possession of the vessel, to make any further declaration of abandonment, but I now do so in order to put that fact formally on record, and now again give you notice thereof." The vessel was eventually sold by consent of all parties interested for \$150.

Insurance, Marine—Continued.

In an action on the policy for a total loss, **Held**, reversing the judgment of the court below, that there was not sufficient evidence to enable plaintiffs to recover as for a total or constructive total loss of the vessel.

Per Fournier, J.—That the notice of abandonment was not given in conformity with the Art. 2544 of the Civil Code, and not made within a reasonable time. Art. 2541, C. C.

Western Ass. Co. v. Scanlan.—xiii. 207.

20. *Ins. on freight—Constructive total loss—Abandonment—Repairs by underwriters.*

A vessel proceeding on a voyage from Arecibo to Acquim and thence to New York, encountered heavy weather, was dismasted and was towed into Guantanamo. The underwriters of the freight sent an agent to Guantanamo to look after their interests, and the master of the vessel, under advice from the owners, abandoned her to such agent, and refused to assist in repairing the damage, and complete the voyage. The agent had the vessel repaired and brought her to New York, with the cargo.

In an action to recover the insurance on the freight, **Held**, reversing the judgment of the court below, Strong, J., dissenting, that there being a constructive total loss of the ship the action of the underwriters, in making the repairs and earning the freight, would not prevent the assured from recovering.

Troop v. Merchants' Marine Ins. Co.—xiii. 506.

21. *Description of voyage—Deviation—Question for jury—Misdirection—Waiver—Defective case—Application for the re-hearing of the judgment under.*

A marine policy insured a ship for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom. The ship went from Valparaiso to Lobos, an island from twenty-five to forty miles off the coast of South America and was afterwards lost. In an action on the policy

Held, that whether or not Lobos was a loading port on the western coast of South America within the policy was a question for the jury, and it not having been submitted to them a new trial was ordered for misdirection.

After judgment application was made to vary or reverse the judgment on affidavits showing that the question was submitted and answered.

Held, that the application was too late, as the court had to determine the appeal case transmitted, and the respondent had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended.

Providence Washington Ins. Co. v. Gerow.—xiv. 781.

See INSURANCE, MARINE, 29.

Insurance, Marine—Continued.**22. Loss from detention by ice—Perils insured against—Ordinary perils of the seas.**

A vessel on her way to Miramichi, N. B., was chartered for a voyage from Norfolk, Vir., to Liverpool with cotton. She arrived at Miramichi on November 25th, and sailed for Norfolk on the 29th. Owing to the lateness of the season, however, she could not get out of the river and she remained frozen in the ice all winter and had to abandon the cotton freight.

Held, reversing the judgment of the Supreme Court of New Brunswick (24 N. B. Rep. 421), Henry, J., dissenting, that the loss occasioned by the detention from the ice was not a loss by "perils of the seas" covered by an ordinary marine policy.

The Great Western Ins. Co. v. Jordan.—June 22, 1886.—xiv. 784.

23. Insurable interest—Not disclosed when policy issued—Notice of abandonment—Authority of agent.

The part owner of a vessel may insure the shares of other owners with his own, without disclosing the interest really insured, under a policy issued to himself insuring the vessel "for whom it may concern."

An agent effecting insurance under authority for that purpose only may, in case of loss, give notice of abandonment to the underwriters without any other or special authority.

Merchants' Marine Insurance Co. v. Barss.—xv. 186.

24. Condition of policy—Validity of—Claim not made within delay stipulated by the policy—Art. 2184, C. C.—Waiver.

A condition in a marine policy that all claims under such a policy shall be void unless prosecuted within one year from date of loss, is a valid condition not contrary to Art. 2184, C. C., and all claims under such a policy will be barred if not sued on within one year from the date of the loss.

The plaintiff cannot rely on appeal on a waiver of the condition, unless such waiver has been properly pleaded.

Per Taschereau, J.—The debtor cannot stipulate to enlarge the day to prescribe, but the creditor may stipulate to shorten that day.

Allen v. Merchants' Marine Insurance Co.—xv. 488.

25. Warranty in policy—Time of sailing—Action on policy—Limitation of time—Defective proof—Whether time runs from filing of.

A vessel insured for a voyage from Charlottetown to St. Johns, Nfld., left the wharf at Charlottetown on December 8. with the *bona fide* intention of commencing her voyage. After proceeding a short distance, she was obliged by stress of weather to anchor within the limits of the harbour of Charlotte-

Insurance, Marine—Continued.

town and remained there until December 4, when she proceeded on her voyage.

Held, that this was a compliance with the warranty in the policy of insurance to sail not later than December 3, but a breach of warranty to sail from the port of Charlottetown not later than December 3.

A clause in the marine policy required action to be brought on it within twelve months from the date of depositing claim for loss or damage at the office of the assurers. A protest was deposited accompanied by a demand for the insurance. The protest was defective and some months later an amended claim was deposited.

Held, affirming the judgment of the court below, that an action begun more than twelve months after the original, but less than twelve months after the amended claim was deposited, was too late.

Robertson v. Pugh.—xv. 706.

26. Exceptions in policy—Barratry—Proximate cause of loss—Perils of the seas.

Insurance in a marine policy against loss "by perils of the seas," does not cover a loss by barratry.

It is not necessary that barratry should be expressly excepted in a marine policy to relieve the insurers from liability for such a loss.

Per Strong, J., dissenting.—If the proximate cause of the loss is a peril of the seas covered by the policy the underwriter is liable, though the primary cause may have been a barratrous act.

O'Connor v. Merchants' Marine Insurance Co.—xvi. 331.

27. Constructive total loss—Liability of company—Cost of repairs—One-third new for old—Construction of condition when vessel not repaired.

A policy of insurance on a ship contained the following clause:—"In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy shall amount to more than half of its value, as declared in this policy." The ship being disabled at sea put into port for repairs, when it was found that the cost of repairs and expenses would exceed more than one-half of the value declared in the policy if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made, but not if it was made.

Held, affirming the judgment of the court below, *Patterson, J., dissenting*, that the "cost of repairs" in the policy meant the net amount after allowing one-third of the actual cost in respect of new for old, according to the rule

Insurance, Marine—Continued.

usually followed in adjusting partial loss, and not the estimated amount of the gross costs of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value.

Gerow v. British American Ins. Co. }
v. Royal Canadian Ins. Co. }—xvi. 524.

28. Delay in prosecuting voyage—Deviation—Enhancement of risk.

There is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or unexcused delay, either in commencing or in completing the voyage, alters the risk and absolves the underwriter from liability for subsequent loss.

In case of deviation by delay, as in case of departure from the usual course of navigation, it is not necessary to show that the peril has been enhanced in order to avoid the policy.

Spinney v. The Ocean Mutual Marine Ins. Co.—xvii. 326.

29. Construction of policy—Deviation—Loading port on west coast of South America—Guano Islands—Commercial usage.

The voyage specified in a marine policy included "a loading port on the western coast of South America," and payment of a loss under the policy was resisted on the ground of deviation, the vessel having loaded at Lobos, one of the Guano Islands, from twenty-five to forty miles off the coast. On the trial of an action to recover the insurance evidence was given by shipowners and mariners to the effect that, according to commercial usage, the said description in the policy would include the Guano Islands, and there was evidence that when the insurance was effected a reduction of premium was offered for an undertaking that the vessel would load Guano. The jury found, on an express direction by the court, that the island where the vessel loaded was on the western coast of South America within the meaning of the policy.

Held, affirming the judgment of the court below, that the words in the policy must be taken to have been used in a commercial sense and as understood by shippers, shipowners and underwriters; and the jury having based their verdict on the evidence of what such understanding would be, and the company being aware of a Guano freight being contemplated, the finding should not be disturbed.

The Providence Washington Ins. Co. v. Gerow.—xvii. 387.

30. Total loss—Evidence—Right to recover for partial loss.

A vessel insured for a voyage from Newfoundland to Cape Breton went ashore on Oct. 30th at a place where there were no habitations, and the master had to travel several miles to communicate with the owners. On Nov. 2nd a

Insurance, Marine—Continued.

tug came to the place where the vessel was, but the master of the tug after examining the situation, refused to try and get her off the rocks. On Nov. 16th one of the owners and the captain went to the vessel and caused a survey to be had and the following day the vessel was sold for a small amount, the purchaser eventually stripping her and taking out the sails and rigging. No notice of abandonment was given to the underwriters and the owners brought an action on the policy claiming a total loss. The only evidence of loss given at the trial was that of the captain who related what the tug had done and swore that, in his opinion, the vessel was too high on the rocks to be got off. The jury found, in answer to questions submitted, that the vessel was a total wreck in the position she was in and that a notice of abandonment would not have benefitted the underwriters. On appeal from a judgment refusing to set aside a verdict for the plaintiff and order a non-suit or new trial,

Held, per Ritchie, C.J., and Strong, J., that there was evidence to justify the trial judge in leaving to the jury the question whether or not the vessel was a total loss, and the finding of the jury that she was a total loss being one which reasonable men might have arrived at it should not be disturbed.

Per Taschereau, Gwynne and Patterson, JJ., that the vessel having been stranded only, and there being no satisfactory proof that she could not have been rescued and repaired, the owners could not claim a total loss.

Held, Gwynne, J., dissenting, that there being evidence of some loss under the policy, and the owner being entitled, in his action for a total loss, to recover damages for a partial loss, a non-suit could not be entered, but there should be a new trial unless the parties agreed on a reference to ascertain the amount of such damages.

Per Gwynne, J., that the plaintiff could not recover damages for a partial loss of which he offered no evidence at the trial but rested his claim wholly upon a total loss.

Phoenix Ins. Co. v. McGee.—xviii. 61.

31. Application—Promissory representation—"Would tow up and back."

An application for insurance on a vessel in a foreign port, in answer to the questions: Where is the vessel? When to sail? contained the following: Was at "Buenos Ayres or near port 3rd February bound up river; would tow up and back." The vessel was damaged in coming down the river not in tow. On the trial of an action on the policy it was admitted that towing up and down the river was a matter material to the risk.

Held, affirming the judgment of the court below, that the words "would tow up and back" in the application did not express a mere expectation or belief on the part of the assured, but amounted to a promissory representation that the vessel would be towed up and down, and this representation not having been carried out the policy was void.

Bailey v. The Ocean Mutual Marine Ins. Co.—xix. 153.

Insurance, Marine—Continued.**32. Subject of insurance—Insurance on advances—Wording of policy—Insurable interest.**

A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co. do cause to be insured, lost or not lost, the sum of \$2,000, *on advances*, upon the body, etc., of the "Lizzie Perry." The rest of the policy was applicable to insurance on the ship only. L. & Co. were managing owners who had expended considerable money in repairs on the vessel. In an action on the policy the insurers claimed that the insurance was on advances by the owners which were not insurable.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the instrument must, if possible, be construed as valid and effectual and to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship.

The British America Assurance Co. v. Law.—xxi. 325.

33. Contract—Application for insurance—Agreement to forward—Evidence—Escrow.

B. wishing to insure his vessel the "C. U. Chandler" went to a firm of insurance brokers, who filled out an application and sent it by a clerk to K., agent for a foreign marine insurance company. In the application the vessel was valued at \$2,500 and the rate of premium was fixed at 11 p. c. K. refused to forward the application unless the valuation was raised to \$3,000—or 12 p. c. premium was paid. This was not acceded to by the brokers but K. filled out an application with the valuation increased and forwarded it to the head office of his company. On the day that it was mailed the vessel was lost and four days after K. received a telegram from the attorney of the company at the head office as follows: "'Chandler' having been in trouble we have telegraphed you declining risk, but had previously mailed policy; please decline risk and return policy." The policy was received by K. next day and he returned it at once; he did not show it to the brokers or to B., nor informed them of its receipt. In an action by B. against K. to recover damages for neglect in not forwarding the application promptly, with a count in trover for conversion of the policy,

Held, affirming the judgment of the Supreme Court of New Brunswick, that as K. was never authorized nor requested to forward the application which he did forward, namely, that in which the vessel was valued at \$3,000, and had refused to forward the only application authorized by the brokers on behalf of B., the latter could maintain no action founded on negligence.

Held, further, that the property in the policy prepared at the head office and sent to K. never passed out of the company and was at the most no more than an *escrow* in the hands of K., the agent, and therefore trover would not lie against K. for its conversion.

Buck v. Knowlton.—xxi. 371.

Insurance, Marine—Continued.**34. Marine insurance—General average—Insurance on hull—Cost of saving cargo—Average bond.**

A vessel loaded with coal stranded and was abandoned. Notice of abandonment was given to the underwriters on the hull. The cargo was not insured. The owners of the cargo offered to take it out of the vessel but the underwriters preferred to do it themselves and an average bond was executed by the underwriters and owners by which they respectively agreed to pay the said loss according to their several shares in the vessel, her earnings as freight and her cargo, the same to be stated and apportioned in accordance with the established usage and law of the province in similar cases by a named adjuster. Efforts having been made to save both vessel and cargo, resulting in a portion of the latter being taken out but the remainder and the vessel being abandoned, the adjuster apportioned the loss making the greater part payable by the owners of the cargo. In an action on the bond to recover this amount,

Held, affirming the decision of the Court of Appeal for Ontario, that the owners of the cargo were only liable, under the bond, to pay such amount as would be legally due according to the principles of the law relating to general average; that the cargo and vessel were never in that common peril which is the foundation of the right to claim for general average, that the money expended, beyond what was the actual cost of the salvage of the cargo saved was in no sense expended for the benefit of the cargo owners; and the defendants having paid into court a sum sufficient to cover such actual cost the underwriters were not entitled to a greater amount,

The Western Assurance Co. v. The Ontario Coal Co. of Toronto.

—xxi. 383.

Intercolonial Railway.

See PETITION OF RIGHT, 1, 8.

Interest—Arrears of, prescription against.

See PRESCRIPTION, 1.

2. Chargeable against testamentary executors.

See EXECUTORS.

3. Misdirecting Jury as to, on Promissory Note.

See EVIDENCE, 5.

4. On deposit in Court under 31 V. c. 12 and 37 V. c. 13 (N.S.)—Officer of Court not entitled to.

See JURISDICTION, 13.

Interest—Continued.

5. On covenant in mortgage—Evidence.

A note dated 11th January, 1882, payable to and endorsed by one S. H., was for \$3,000 with interest at the rate of two per cent, per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1882, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment.

Held, that the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1882, and not that interest should be paid at that rate after such day if the principal should then remain unpaid.

St. John v. Rykert.—x. 278.

6. Petition of right—Government contract—Unliquidated damages—Interest—Right of contractor to.

M. & Co. brought an action by petition of right against the Dominion Government, for damages for an alleged breach of contract whereby the suppliants contracted for the Parliamentary and Departmental printing for a certain specified period. The alleged breach consisted in the Government giving a portion of the said printing to other parties, the suppliants claiming that, by the terms of the contract, they were entitled to the whole of it. The Crown demurred to the petition, and as to the departmental printing, the demurrer was overruled (8 Can. S. C. R. 210). The petition subsequently came on for hearing in the Exchequer Court, and a reference was made to the Registrar and Queen's Printer to ascertain and report as to the profit lost to the suppliants by not being allowed to do the departmental printing. The referees found a certain sum as the profit lost to suppliants, stating in their report, that the suppliants claimed interest on the amount, but that the referees were of opinion they had no power, under the order of reference to consider the question of interest.

No exception was taken to the report of the referees, and the suppliants moved in the Exchequer Court for judgment for the amount found by the referees with interest, as the damages to which they were entitled under their petition of right. Mr. Justice Henry, before whom the motion was made, gave judgment for the amount found by the referees with interest thereon at 6 per cent., such interest to be computed on the aggregate of the sums which, according to said report, the suppliants up to the 31st day of December, in each year during the currency of the said contract, would have received as profit.

On appeal to the Supreme Court of Canada from that part of the judgment allowing interest, **Held**, Henry, J., dissenting, that the suppliants were

Interest—Continued.

not entitled to interest on the amount found by the referees for loss of profits.

Appeal allowed with costs.

The Queen v. MacLean et al.—12th May, 1885.

7. *Mortgage—Rate of interest—Fixed time for payment of principal*—“Until principal and interest shall be fully paid and satisfied.”

A mortgage of real estate provided for payment of the principal money secured on or before a fixed date “with interest thereon at the rate of ten per centum per annum until such principal money and interest shall be fully paid and satisfied.”

Held, affirming the judgment of the Court of Appeal for Ontario, that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. *St. John v. Rykert*, (10 Can. S. C. R. 278), (*See Interest 5*), followed.

The People's Loan and Deposit Co. v. Grant.—xviii. 262.

8. *Legislative authority over*—B. N. A. Act ss. 91 & 92—Penalty for non-payment of taxes—Municipal Act 49 V. c. 52, s. 626 (Man.)—50 V. c. 10 s. 43 (Man.).

See LEGISLATURE, 20.

MUNICIPAL CORPORATION, 16.

9. *Contract—Final Certificate of Engineer—Interest to be computed from date of.*

See CONTRACT, 53.

10. *On construction of deed of sale.*

See SALE OF LANDS, 18.

Interpleader—Voluntary payment by purchaser to sheriff of amount of execution against vendor—Proceeds not the subject of interpleader by third party having lien.

See SALE OF LANDS, 19.

2. *Judgment on interpleader issue under execution on a final judgment not an interlocutory order within s. 5 of the Ontario Judicature Act, or if interlocutory is such an order as was appealable before that Act, and therefore in any case now appealable to the Court of Appeal.*

See CORPORATIONS, 30.

Interpretation Act—31 V. c. 1 (D.), applicable to P. E. Island.

See CANADA TEMPERANCE ACT 1878, 5.

Interrogatories—On articulated facts—Evasive answers—C. C. P. Arts. 228, 229.

See CONTRACT, 12, 17.

2. *Commission from Supreme Court of N. B.—C. S. c. 37—Directed to two commissioners—Return signed by one only—Failure to administer interrogatories.*

A commission was issued out of the Supreme Court of New Brunswick directed to two commissioners, one named by each of the parties to the suit—to take evidence at St. Thomas, W. I., with liberty to plaintiff's commissioner to proceed *ex parte* if the other neglected or refused to attend. Both commissioners attended examination and defendant's nominee cross-examined the witness, but refused to certify to the return, which was sent back to the court signed by one commissioner only. Some of the interrogatories and cross interrogatories were not put to the witnesses by the commissioners.

Held, reversing the judgment of the court below, 23 N. B. R. 160, that the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received.

Per Ritchie, C.J., and Strong, Fournier and Henry, JJ., that the refusal of one commissioner to sign the return, did not vitiate it.

Per Gwynne, J., that the return should have been signed by both commissioners, and not having been so signed, was void, and the evidence under it should not have been read.

Milville Mutual Marine and Fire Ins. Co. v. Driscoll.—xi. 183.

Intervention—Judgment in favour of the Crown—Escheat—Tierce opposition by possessor of land escheated—Intervention by purchasers from Crown—Status of parties.

See PRACTICE, 14.

Intestate Estate.

See DISTRIBUTION OF ESTATE.

Intimidation.

See ELECTION, 22.

Inventory—And partition between co-heirs, action to annul.

See PARTITION.

CAS. DIG.—26

Issue—Any of his body lawfully begotten or children of such issue surviving him—Meaning of.

See WILL, 2.

J.

Jail—Establishment of County Courthouse and jail—Right to remove from shire town—5th ser. c. 20, s. 1, 49 V. c. 11. (N. S.).

See MUNICIPAL CORPORATION, 22.

Joint Tenancy—Construction of will—Evidence to establish—Intention—Severance.

See WILL, 20.

Judge—Discretion of—Insolvent bank—Appointment of liquidator—Right to appoint another bank.

See WINDING-UP, 10.

2. Trial by—Findings on matters of fact—Interference with on appeal.

See EVIDENCE, 49.

Judicial Avowal—*Deed, erroneous statement in* — Art. 1243, C. C. L. C.

By notarial deed, dated 3rd May, 1875, F. McN. and P. K. purchased from one F. C. certain printing materials. The agreed price was \$5,000, and was paid; but the deed erroneously stated the price to be \$7,188.40, which amount was acknowledged in the deed to have been paid and received. C. remained in possession, and, after being in partnership with M. for several months, failed. On 7th March, 1876, F. McN. and P. K. claimed the plant, and their petition stated the purchase had been made in good faith, and that they had paid the agreed price, but that the deed erroneously stated the price to be \$7,188.40. The evidence as to the price agreed upon and paid was that of F. McN., and his statement was confirmed by F. C. The appellant, as assignee to the insolvent estate of F. C. & M., claimed the payment of \$2,188.40, being the balance between the consideration price mentioned in the deed and the \$5,000 admitted to have been paid.

Held, affirming the judgment of the court below, that the only evidence in support of appellant's contention being that of F. McN., the respondent, the

Judicial Avowal—Continued.

appellant, could not divide the respondent's answers (*aveu judiciaire*) in order to avail himself of what was favourable and reject what was unfavourable.

Per Strong, J., dissenting.—Although there is an error, or even a false statement in a deed, the obligation to pay the consideration proven to be the true and legitimate one remains.

Fulton v. McNamee.—ii. 470.

Judgment.—When appealable,

See FINAL JUDGMENT.
JURISDICTION.

2. Of confirmation.

See PETITION OF RIGHT, 8.

3. Against joint misfeasors—Effect of.

See PETITION OF RIGHT, 15.

4. Requête Civile against—Application to stay entry and execution of.

See OPPOSITION, 2.

5. Revocation of—Requête Civile—Opposition.

See SHERIFF, 5.

6. *Setting aside—Execution—Assignment—Executors—Fraud—Estoppel—Appeal.*

The plaintiffs by their agent, Patrick Rooney, in April, 1877, procured a judgment to be signed against Peter Rooney, the defendant, who, for purposes of his own, suffered the judgment to go by default. No execution was ever issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick, who paid them \$50 therefor; and, on her application, Armour, J., made an order allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment, as having been fraudulently obtained, and to be allowed to defend the action, or for such other order as should seem just; and upon such application Wilson, C.J., made an order setting aside the judgment and all proceedings in the action, and directing the plaintiffs to repay the \$50. This order was affirmed on appeal by the Common Pleas Division.

The case was appealed to the Court of Appeal for Ontario. The facts will be found more fully set out in the report of the judgments of that court, 11 Ont. App. R. 678.

As appears from that report, the Court of Appeal, Held, that an appeal lay from the order of the Common Pleas Division to the Court of Appeal, as

Judgment—Continued.

it was in fact a final disposition of the whole matter and a bar to the plaintiff's further proceeding, but although the members of the court were all of opinion for different reasons, that the order below was wrong, they did not agree as to the extent to which it should be modified or reversed, and therefore the appeal was dismissed without costs.

Per Hagarty, C.J.O., and Osler, J.A.—The judgment should merely be set aside and the executors allowed in to defend.

Per Burton, J.A.—The executors cannot be heard to allege their testator's fraudulent purpose; they are estopped from confining the operations of the judgment within the limit of his intended fraud; and the judgment should be allowed to stand.

Per Patterson, J.A.—The judgment should not be set aside, but the order of Armour, J., should be rescinded, and it should be declared that Patrick's wife, as assignee of the judgment, was not entitled to issue execution, because the judgment was procured by Patrick, her husband, and suffered by Peter, for a fraudulent purpose, of which she had notice when she took the assignment.

On appeal to the Supreme Court of Canada, *Held*, that it was doubtful if an appeal would lie to the Supreme Court of Canada in such a case, but if it would, the order of Wilson, C.J., affirmed by the judgment of the Divisional Court, should not be interfered with.

Per Gwynne, J., (delivering the judgment of the court):

I entertain great doubt that an appeal lies to this court from the judgment of the Common Pleas Divisional Court of the High Court of Justice for Ontario, in a case like the present, which originates in the decision of a judge in chambers from whose judgment an appeal lay to the Divisional Court.

In granting the rule against which this appeal is taken, that court exercised a jurisdiction inherent in it, and resting wholly, as it appears to me, on its discretion, to remove from the records of the court a judgment the enforcing which in the interest of the person having an assignment of it, against the estate of the deceased defendant, would, in the opinion of the court, under the circumstances appearing in the case, work a very great wrong to that estate, and so, to prevent the abuse of the process of the court for the perpetration of what appeared to the court to be a great fraud, it ordered the judgment and subsequent proceedings thereon to be set aside, as the only effective mode of affording protection to the estate of the deceased defendant from a protracted and expensive litigation upon proceedings which might be taken to enforce the judgment by writ of revivor, or by action upon it to be carried on in the name of the judgment plaintiffs, but in the interest of the fraudulent assignee, who procured the judgment to be entered without the knowledge of the nominal plaintiffs, as is sworn by Carl Schroeder, and admitted by Patrick Rooney, who procured the judgment, and who admits that the nominal plaintiff did not know of the judgment previous to December, 1882, when upon his procurement it was assigned to his wife. But if it be appealable, we should not interfere with the finding of the learned Chief Justice Wilson sitting in chambers,

Judgment—Continued.

affirmed by the judgment of the Divisional Court thereon. The case is so pregnant with fraud on the part of Patrick Rooney, the substantial assignee of the judgment as to raise doubts in my mind, whether his brother Peter was not rather his dupe under circumstances which by reason of the death of Peter cannot now be disclosed, than a party to the contrivance of any fraud against Dolan, to perpetrate which is now suggested as having been Patrick's sole motive in causing the action to be brought in the name of Schröder and Company, and the suffering judgment therein by default by Peter, for it appears that Peter left this country for Ireland a few days after the service of the writ upon him, and it is not improbable that he left his interests in the defence of this suit, as he did in his defence to the suit brought in Montreal by Dolan against him and Francis Rooney, to the care of Patrick, who appears to have represented both Peter and Francis in that suit, and to have done whatever was done in it in their names, and to have effected the final settlement thereof, which is signed by him as their attorney.

By whomsoever the goods in question were ordered, a point which is not made quite clear, and whatever Mr. Carl Schröder, the agent of the nominal plaintiffs at New York, may have thought as to the liability of Peter to the firm of Schröder & Co. originally for those goods in virtue of the order given for them, it appears very clear that Patrick Rooney, who was the agent at Montreal of Schröder & Co., well knew that in truth and in fact Peter never was liable therefor, for before the goods were sent out to this country he had left the firm, and the goods arrived at Montreal subject to control of Patrick as agent of Schröder & Co., and with his assent only they could have been and were delivered to Rooney & Dolan, and, on the failure of that firm, Patrick, as agent for Schröder & Co., proved for the whole claim against the estate of Rooney & Dolan, in pursuance and by reason of which proof Carl Schröder, the agent at New York, received dividends from that estate upon the whole amount, and, as is sworn by Roughan, the firm accepted Rooney and Dolan as their debtors and never looked to Peter Rooney for the amount.

Carl Schröder now swears, and in this he is confirmed by Patrick Rooney, that Schröder & Co. never knew of the recovery in their name of any judgment against Peter Rooney until December, 1882, when Patrick applied to Carl for an assignment of it, and it was immediately upon his request assigned to his wife without any consideration paid therefor. The fifty dollars afterwards paid to Carl Schröder by Patrick was paid quite voluntarily and evidently for the purpose of endeavouring to give a semblance of *bona fides* to the transaction and of assisting Patrick in setting up the claim to the judgment now made by him on behalf of his wife as if purchased *bona fide* for value. The only objection which can, I think, be taken to C. J. Wilson's order is that he has ordered this sum of fifty dollars to be paid to Patrick by Peter's executors. By this time Schröder & Co. were doubtless well aware that they never had any claim against Peter for the amount or any part of the amount mentioned in the judgment procured to be entered in their name as plaintiffs against Peter, and that they set no value upon that judgment appears from their having assigned it, at Patrick's request, to his wife, the moment they heard of its existence, and for no consideration whatever paid at the time, or bargained for being paid in future.

Judgment—Continued.

As to the objection that it was not competent for Chief Justice Wilson to entertain a motion which, if successful, would have the effect of annulling Mr. Justice Armour's order to let execution issue on the judgment, even though he did so after conference with Mr. Justice Armour, and with his assent, it is sufficient to say that a question as to the propriety of such matter of judicial etiquette, is not a matter which is appealable, and the statement in Chief Justice Wilson's order as to what took place before him, and as to the matter which was submitted to and argued before him must be taken to be conclusive.

It is agreed by all that execution should not under the circumstances appearing in the case be allowed to issue in favour of the assignee of this judgment. What objection then can there be to setting it aside altogether, the court being satisfied that to enforce it in favour of Patrick and his wife would operate as a fraud on Peter's estate? If the judgment be not set aside, it will be competent for Patrick on behalf of his wife and himself to use the names of Schroeder & Co., as plaintiffs, to sue upon the judgment, or to bring a writ of revivor of it, and to neither of such proceedings could the matters which have been the subject of investigation on the motion before Chief Justice Wilson be pleaded as a defence, and so, although the court is of opinion that Patrick and his wife should derive no benefit from the assignment they will be able to recover the whole amount of the judgment, unless it be absolutely set aside. But it is said that the judgment ought not to have been set aside except upon terms of allowing the action to go against Peter's executors. But for what purpose should this have been directed when it appears that the nominal plaintiffs do not claim to have had any cause of action against Peter, and that they were not aware of an action having been brought against him in their name as plaintiffs, and that if they ever had any cause of action against Peter, they have assigned it without consideration, to Patrick's wife, at the request of Patrick, who, however, well knew that in truth no such cause of action ever did exist?

The setting aside the judgment and all proceedings thereon, is, in fact, the only mode of giving to Peter's executors effectual relief against what I think very clearly appears to be a fraud upon Peter's estate, attempted to be perpetrated by Patrick Rooney.

Appeal dismissed with costs.

Schroeder, et al. v. Rooney.—9th April, 1886.

7. Contempt of court—Practice—Judgment not final—No appeal
—R. S. C. c. 135, s. 24 (a).

See JURISDICTION, 53.

8. In case from Quebec—Appeal from—Future rights—R. S. C.
c. 135, s. 29 (b).

See JURISDICTION, 54.

Judgment—Continued.

9. Contempt of court—Appeal from—Discretion—R. S. C. c. 135, s. 27.

See JURISDICTION, 55.

CONTEMPT, 3.

10. Service of—Hypothecary action—Absent defendant—Waiver of irregularity—Art. 476, C. C. P., C. S. L. C. c. 49, s. 15.

See PRACTICE, 3.

- 10(a). Provincial election—Bribery—Action for penalties—Effect of judgment—Disqualification—Appeal—Future rights—Fee of office,

See JURISDICTION, 64.

11. *Bank shares—Seizure—Intervention—Res judicata—Art. 1241, C. C.*

A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the corpus of said shares nor as to the dividends of other shares claimed under a different title.

Muir v. Carter, } —xvi. 473.
Holmes v. Carter. }

And see TRUSTS AND TRUSTEES, 14.

12. A judgment allowing demurrer to plaintiff's replication to one of several pleas, which does not operate to put an end to the whole or any part of the action or defence is not a final judgment from which an appeal will lie.

Shaw v. The Canadian Pacific Ry. Co.—xvi. 708.

13. Counter actions for breaches of agreement—Right to set off judgment—Equitable assignment.

See SET OFF, 3.

14. Of Supreme Court of N. W. T. in a matter not arising in a Superior Court—Appeal from—51 V. c. 37, s. 3 (D.).

See JURISDICTION, 68.

15. *Action to set aside—Collusion.*

S., a judgment creditor of J. N., sr., applied to the Supreme Court of New Brunswick on affidavits, to have a judgment of J. N., jr., against said J. N., sr., his father, set aside as being obtained by collusion and fraud, and in order to

Judgment—Continued.

cover up assets of the said J. N., sr. The facts alleged in the affidavits supporting the application were: that a cognovit was given and said judgment of J. N., sr., was signed on the same day; that no account was ever rendered of the debt; that no entries were ever made by said J. N., jr. against his father; that the account for which the cognovit was given was made up from calculation and not from books; that the father had offered to have the judgment discharged on payment of a much smaller sum; and that on an examination of the father for disclosure he would not swear that he owed his son the amount and that he had no settlement of accounts. The affidavits in answer stated how the debts had accrued, giving the details; that there was no collusion between the father and son; that the son frequently asked his father for a settlement but could not get it; and that he had never been a party to, or authorized any settlement. The court below held that the applicant had failed to show fraud and refused to set aside the judgment.

Held, that the decision of the court below should be affirmed.

Present:—Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Snowball v. Neilson, March 18th, 1889.—xvi. 719.

16. Dismissing petition to set aside judgment in action to realize mechanics' lien—Not a final judgment—No jurisdiction—S. & E. C. Act, R. S. C. c. 135, s. 24 (a) & s. 27.

See JURISDICTION, 69.

17. Quashing writ of appeal to Q. B. L. C. on the ground that judgment appealed from is interlocutory and not final—Art. 1116, C. C. P.—Not a final judgment—Case referred back to Superior Court by Court of Review to ascertain damages—Amount in controversy not determined—S. & E. C. Act, R. S. C. c. 135, ss. 28 & 29.

See JURISDICTION, 71.

18. On motion for non-suit or new trial—Notice of appeal—Extension of time for giving—Application after time expired—S. & E. C. Act, R. S. C. c. 135, s. 41.

See JURISDICTION, 73.

19. On motion for new trial—S. & E. C. Act, R. S. C. c. 135, s. 24 (a)—Construction of.

See JURISDICTION, 74.

20. Solicitor and client—Negligence of solicitor in failing to register judgment.

See SOLICITOR AND CLIENT, 5.

Judgment—Continued.

21. Suit against succession—Judgment in favour of Crown for possession of land—Sale to advocate—Tierce opposition to judgment by proprietor—Intervention—Arts. 1485 & 1583, C. C.—Prescription—Arts. 2216, 2242, 2265, 2187, C. C.

See PRACTICE, 14.

22. *Mandamus*—Proceedings on—Interlocutory judgment—Appeal.—R. S. C. c. 135, s. 24 (g)—Word “judgment” in.

See JURISDICTION, 77.

23. Order for new trial on the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interest of the parties on the findings of the jury as a whole, not a final judgment from which an appeal will lie—S. & E. C. Act, R. S. C. c. 135, ss. 24 (g.) 30 & 61.

See JURISDICTION, 78.

24. Directing petition contesting a seizure before judgment to be proceeded with at same time as hearing of main action not a final judgment appealable to Supreme Court. R. S. C. c. 135, ss. 24 & 28.

See JURISDICTION, 79.

25. New trial ordered by Court of Q. B. *suo motu* on ground that assignment of facts and answers of jury insufficient—not a final judgment within meaning of S. & E. C. Act.

See JURISDICTION, 80.

26. Order refusing Application to judge in Chambers to set aside a writ of summons—Not a final judgment from which appeal will lie.

See JURISDICTION, 81.

27. Final judgment—Specially endorsed writ—Order to sign judgment—Discretionary order—Not appealable.

See JURISDICTION, 89.

Judgment—Continued.

28. S. & E. C. Amending Act, 1891—54-55 V. c. 25 s. 3—Appeal from Court of Review—Judgment of, rendered the day Act passed—Jurisdiction.

See JURISDICTION, 90.

29. *Court equally divided—Effect of.*

When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed, the result of the case in the Supreme Court affects the actual parties to the litigation only and the Court, when a similar case is brought before it, is not bound by the result of the previous case.

Stanstead Election Case (Rider v. Snow).—xx. 12.

30. Order restraining action with liberty to apply—Not a final judgment from which an appeal will lie.

See JURISDICTION, 91.

31. Acquiescence in—Intervention—Abandonment of appeal.

See JURISDICTION, 94.

32. Acquiescence in—Attorney *ad litem*—Agreement not to appeal by.

See JURISDICTION, 95.

33. Finding generally that corrupt acts proved not too vague under R. S. C. c. 9, s. 43.

See ELECTIONS, 46.

34. Registry Act, R. S. N. S. 5th series, c. 84, s. 21—Priority of registered judgment—Mortgage—Rectification of mistake in.

See REGISTRATION, 8.

35. Application to be admitted as attorney—Appeal from order refusing—Final judgment—Jurisdiction—Security for costs.

See JURISDICTION, 100.

36. Executor, incumbrance of estate by—Judgment obtained by legatee—Priority of—Over judgments of personal creditors of executors.

See EXECUTORS, 13.

Judgment—Continued.**37. Report of taxing officer—Appeal from—Final judgment.**

See JURISDICTION, 102.

38. Proceedings *en reprise d'instance*—Contestation—Will—*Res judicata*—Art. 439, C.C.P.—Final judgment—R. S. C. c. 135, ss. 2, 24 & 28.

See JURISDICTION, 104.

39. Contempt of Court—Criminal proceeding—S. & E. C. Act, R. S. C. c. 135, s. 68—Deferring sentence—No final judgment.

See JURISDICTION, 107.

40. Sending case to referee to ascertain damages—Final judgment sustaining report—Appeal limited to, the first judgment not having been appealed from.

See JURISDICTION, 108.

Judicature Act.—Of Nova Scotia—Rule 476—Motion for new trial—Disposal of whole case on.

See PRACTICE, 19.

Jurisdiction.—Appeal—Right to.

Held, an appeal lies direct to the Supreme Court of Canada from the Supreme Court of Judicature of the Province of Prince Edward Island, as being the highest court of final resort in that Province.

Kelly v. Sullivan, P.E.I.—i. 1.

2. Appeal—In matter of discretion.

Held, under sec. 22 of the Supreme and Exchequer Court Act, no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion.

[But see R. S. C. c. 135, s. 24 (d), as amended by 54 & 55 V. c. 25, s. 2.]

Boak v. The Merchants' Marine Ins. Co.—i. 10.

3 Appeal—Right to appeal under 38 V. c. 11, s. 26—Sum or value in dispute.

Held, that the court proposed to be appealed from, or any judge thereof, cannot, under s. 26 of the Supreme and Exchequer Court Act, allow an appeal when judgment had been signed, entered or pronounced previous to the 11th day of January, 1876.

Taylor v. The Queen.—i. 65.

Jurisdiction—Continued.**4. Appeal—Right to appeal by defendant, (P.Q.)**

The 38th V. c. 11, s. 17, enacts that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value in dispute does not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down wall, and remove all new works complained of, &c., in the wall of H.'s house, and pay £500 damages, with interest and costs. H. obtained judgment for \$100 damages against J., who was also condemned to remove the works complained, or pay the value of "*mitoyenneté*."

Held, Strong, J. dissenting, that in determining the sum or value in dispute in cases of appeal by a defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment.

Per Strong, J., dissenting.—The amount in dispute was the sum awarded for damages and the value of the wall of which the demolition was ordered by the judgment appealed against.

Joyce v. Hart.—i. 321.

5. Appeal—Sum or value in dispute—Jurisdiction—Slander—Damages, special and vindictive—Appeal as to quantum of damages.

L., appellant, sued R., the respondent, before the Superior Court at Arthabaska, in an action of damages (laid at \$10,000) for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of \$1,000 for special and vindictive damages. R. appealed to the Court of Queen's Bench (appeal side), and L., the present appellant, did not ask, by way of cross appeal, for an increase of damages, but contended that the judgment for \$1,000 should be confirmed. The Court of Queen's Bench partly concurred in the judgment of the Superior Court, but differed as to the amount, because L. had not proved special damages, and the amount awarded was reduced to \$500, and costs of appeal were given against the present appellant. L. thereupon appealed to the Supreme Court.

Held, Taschereau, J., dissenting, that L., the plaintiff, although respondent in the court below, and not seeking in that court by way of cross appeal an increase of damages beyond the \$1,000, was entitled to appeal; for, in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concluded, and not at the amount of the judgment. *Joyce v. Hart*, 1 Can. S. C. R. 321, reviewed and approved.

2. In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice, and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages. *See Damages* 23.

Levi v. Reed.—vi. 482.

Jurisdiction—Continued.**6. Appeal from (P.Q.)—Amount claimed.**

Held, that although the amount claimed by the declaration was made to exceed \$2,000 by including interest which had been barred by prescription the appeal would lie. (*See Succession.*)

Ayotte v. Boucher.—ix. 460.

7. Appeal—Election petition—Preliminary objections, judgment on, not [appealable—S. 48, c. 11, 38 V.]

On the 21st April, 1877, an election petition was filed in the Prothonotary's office at Murray Bay, district of Saguenay, against the respondent. The latter pleaded by preliminary objections that this election petition, notice of its presentation and copy of the receipt of the deposit had never been served upon him. Judgment was given maintaining the preliminary objections and dismissing the petition with costs. The petitioners, thereupon, appealed to the Supreme Court under 38 V. c. 11, s. 48.

Held, that the said judgment was not appealable, and that under that section an appeal will lie only from the decision of a judge who has tried the merits of an election petition. (*Taschereau and Fournier, JJ., dissenting.*)

[But see now R. S. C. c. 9, s. 50.]

Per Strong, J., (Richards, C.J., concurring,) that the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure.

Brassard v. Langevin.—ii. 819.

8. Appeal—Right to, in Criminal matters—38 V. c. 11, s. 49—Conviction, when unanimous.

In Michaelmas term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the Court of Queen's Bench for Ontario, composed of Harrison, C.J. and Wilson, J., the third judge of said court being absent; and on the 4th February, 1878, the said court, composed of the same judges, delivered judgment affirming the conviction of the appellants for manslaughter.

Held, that the conviction of the Court of Queen's Bench, although affirmed but by two judges was unanimous, and therefore not appealable.

Amer v. The Queen.—ii. 592.

9. Appeal—Final judgment—Demurrer—Supreme and Exchequer Court Act.

Held, an order setting aside a demurrer as frivolous and irregular under the Nova Scotia Practice Act is an order on a matter of practice and not a final judgment appealable under the 11th section of the Supreme and Exchequer Court Act.

Kandick v. Morrison.—ii. 12.

Jurisdiction—Continued.**10. Rule or order setting aside judgment and execution—Appealable.**

T. J. W. sued F. B., and on the 9th June, 1873, F. B. assigned his property under the Insolvent Act of 1869. On 6th August F. B. became party to a deed of composition. On the 17th October F. B. pleaded *puits d'arrest continuance*, that since action commenced he duly assigned under the Act, and that by deed of composition and discharge executed by his creditors he was discharged of all liability. On the 18th November, 1873, the Insolvent Court confirmed the deed of composition and F. B.'s discharge, but F. B. neglected to plead this confirmation. Judgment was given in favour of T. J. W. on the 30th January, 1874. On 30th May, 1876, an execution under the judgment was issued, and on the 28th June, 1876, a rule *nisi* to set aside proceedings was obtained and made absolute.

Held, Strong, J., dissenting, that the rule or order of the court below was one from which an appeal would lie.

2. Reversing the judgment of the Supreme Court of Nova Scotia, that F. B., having neglected to plead his discharge before judgment, as he might have done, was estopped from setting it up afterwards to defeat the execution.

Wallace v. Bossom.—ii. 488.

11. Appeal—Mandamus—Supreme and Exchequer Court Act, ss. 11, 17 and 23.

Held, that the appeal in cases of *mandamus*, under s. 23 of the Supreme and Exchequer Court Act, is restricted by the application of s. 11, to decisions of the "highest court of final resort" in the Province; and that an appeal will not lie from any court in the Province of Quebec but the Court of Queen's Bench. (Fournier and Henry, JJ., dissenting.) Query: Can the Dominion Parliament give an appeal in a case in which the legislature of a province has expressly denied it?

The appeal was quashed with costs, which included general costs of the appeal up to hearing of motion to quash. The registrar taxed the full fee of \$25 on argument of motion. This was increased to \$75 by Henry, J. The objection to the jurisdiction was taken by motion, and also in respondent's factum.

Danjou v. Marquis.—iii. 251.

12. Court of Review (P.Q.)—Appeal direct from—Security for costs of appeal—Supreme and Exchequer Court Act, s. 31—Supreme Court Rule 6.

The following certificate was filed with the printed case, as complying with Rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary, for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as

Jurisdiction—Continued.

security in appeal in this case, before the Supreme Court, according to section (31) thirty-first of the Supreme Court Act, passed in the thirty-eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878. Signed, Hubert, Honey & Gendron, P.S.C."

On motion to quash appeal, **Held**, *per* Ritchie, C.J., and Strong, Fournier and Henry, JJ.—The deposit of the sum of \$500, in the hands of the prothonotary of the court below, made by the appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of the appeal.

Per Henry, J.—Although not within the functions of the Supreme Court to decide upon the sufficiency of the security, the court might have allowed appellant reasonable time to obtain the necessary certificate, had it been asked to do so within a reasonable time after the appeal was first inscribed, but no such request having been made and so long a time having elapsed, the court should not now permit such a course to be taken.

Per Taschereau, J.—The case should be sent back to the court below in order that a proper certificate might be obtained.

Per Strong and Taschereau, JJ.—An appeal does not lie from the Court of Review (P.Q.) to the Supreme Court of Canada. (Henry, J., *contra*).

Macdonald v. Abbott.—iii. 278.

[See now with respect to appeals from the Court of Review, 54 & 55 V. c. 25, s. 3, s-s. 3.]

13. *Appeal—Order of court upon its own officer, when obtained by a third party, is a final order appealable under s. 11 of 38 V. c. 11—Interest on deposit in court under 31 V. c. 12 and 37 V. c. 13—Officer of court not entitled to interest, if received by him—Summary jurisdiction of court over its officers.*

Under 31 V. c. 12, and 37 V. c. 13, the Minister of Public Works of the Dominion of Canada appropriated to the use of the Dominion certain lands in Yarmouth county, known as "Bunker's Island." In accordance with said Acts, on the 2nd April, A. D. 1875, he paid into the hands of W., prothonotary at Halifax, the sum of \$6,180 as compensation and interest, as provided by those Acts to be thereafter appropriated among the owners of said island. This sum was paid at several times, by order of the Supreme Court of Nova Scotia, to one A., as owner, to one G., as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of W., the prothonotary of the court, for some time, H., attorney for G., applied to the Supreme Court for an order of the court calling upon W., the prothonotary, to pay over the interest upon G.'s proportion of the moneys, which interest (H. was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. W. resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the court, for interest, but did not deny that interest had been received by him. A rule *nisi*

Jurisdiction—Continued.

was granted by the court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount.

Held, 1. That the prothonotary was not entitled to any interest which the amount deposited earned while under the control of the court. That, in ordering the prothonotary to pay over the interest received by him, the court was simply exercising the summary jurisdiction which each of the superior courts has over all its immediate officers. (Fournier and Henry, JJ., dissenting).

2. That the order appealed from, being a decision on an application by a third party to the court, was appealable under the 11th s. of 38 V. c. 11. (Fournier, J., dissenting, and Taschereau, J., doubting).

Wilkins v. Gaddes.—iii. 203.

14. Election appeal—Notice of setting down for hearing.

Held, notice of setting down an election appeal for hearing is a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal.

North Ontario Election Case.—Wheler v. Gibbs.—iii. 374.

15. Queen's Counsel, power of appointment of—Rule absolute granting precedence to—Appeal—Jurisdiction.

By 37 V. c. 20, (N.S.), 1874, the Lieutenant-Governor of the province of Nova Scotia was authorized to appoint provincial officers under the name of Her Majesty's counsel learned in the law for the province. By 37 V. c. 21, (N.S.), 1874, the Lieutenant-Governor was authorized to grant any member of the bar a patent of precedence in the courts of the province of Nova Scotia. R., the respondent, was appointed by the Governor General on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the province, and signed by the Lieutenant-Governor and Provincial Secretary, several members of the bar were appointed Queen's Counsel for Nova Scotia, and precedence was granted to them, as well as to other Queen's Counsel appointed by the Governor General after the 1st of July, 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant-Governor was published in the *Royal Gazette* of the 27th May, 1876, and the name of R., the respondent, was included in the list, but it gave precedence and pre-audience before him to several persons, including appellants who did not enjoy it before. Upon affidavits disclosing the above and other facts, and on producing the original commission and letters patent, R., on the 3rd January, 1877, obtained a rule *nisi* to grant him rank and precedence over all Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R.'s precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia on the 26th March, 1877. A preliminary objection was raised to the jurisdiction of the court to hear the appeal.

Jurisdiction—Continued.

Held, that the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada, Fournier, J., dissenting. (For the decision on the merits *see* Legislature, 4.)

Lenoir v. Ritchie.—iii. 575.

16. Appeal—Original Court not a Superior Court—Judgment not appealable—Supreme and Exchequer Court Act, s. 17.

Held, on a motion to quash, that an appeal will not lie to the Supreme Court of Canada in cases in which the court of original jurisdiction is not a Superior Court, and that the Court of Wills and Probate for the County of Lunenburg, Nova Scotia, is not a Superior Court within the meaning of the 17th s. of "The Supreme and Exchequer Court Act."

[*See now* 52 V. c. 37, s. 2.]

Beamish v. Kaulback.—iii. 704.

17. Appeal—Final judgment—Judicial proceeding—42 V. c. 39, s. 3 & 9.

In action instituted in the Superior Court of the Province of Quebec by the appellant against M. A. C. and nine other defendants, the respondents, three of the defendants, severally demurred to the appellant's action, *except* as regards two lots of land, in which they acknowledged the appellant had an undivided share. The Superior Court sustained the demurrer, and, on appeal, the Court of Queen's Bench for Lower Canada (appeal side) affirmed the judgment. The appellant thereupon appealed to the Supreme Court, and moved to quash the appeal, on the ground that the Supreme Court had no jurisdiction.

Held, that as the judgment of the Court of Queen's Bench (the highest court of last resort having jurisdiction in the Province) finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of s. 9 of "The Supreme Court Amendment Act of 1879," such judgment was one from which an appeal would lie to the Supreme Court of Canada; and though an appeal cannot be taken from a court of first instance directly to the Supreme Court until there is a final judgment, yet, whenever a Provincial Court of Appeal has jurisdiction, this court can entertain an appeal from its judgment finally disposing of the appeal, the case being in other respects a proper subject of appeal.

Chevalier v. Cuvillier.—iv. 605.

18. Appeal — Final judgment — Demurrer — Supreme Court Amendment Act, 1879, sec. 3—38 V. c. 16 (Insolvent Act, 1875) ss. 136 & 137—Construction of—Intra vires—Purchase of goods by Insolvent outside of Dominion of Canada—Pleadings.

P. et al., merchants carrying on business in England, brought an action for \$4,000 on the common counts against **J. S. et al.**, and in order to bring S.

Jurisdiction—Continued.

et al. within the purview of section 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by S. *et al.*, from them on the 18th March, 1879, and another purchase on the 29th March of the same year; that when S. *et al.* made the said purchases they had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from P. *et al.*, thereby becoming their creditors with intent to defraud P. *et al.* J. S. (appellant), amongst other pleas, pleaded that the contract out of which the alleged cause of action arose, was made in England and not in Canada. To this plea, P. *et al.* demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects, resident and domiciled in Canada at the time of the purchase of the goods in question and had subsequently become insolvents under the Insolvent Act of 1875, and amendments thereto.

Held, Taschereau and Gwynne, JJ., dissenting, that although the judgment appealed from was a decision on a demurrer to part of the action only, it was a final judgment in a judicial proceeding within the meaning of the 3rd s. of the Supreme Court Amendment Act of 1879.

Shields v. Peak.—viii. 579.

19. Appeal—Judgment by Court of Appeal, partly final, partly interlocutory—Effect of—Experts, references to.

St. L. claimed of S. \$2,125.75, balance due on a building contract. S. denied the claim, and, by incidental demand, claimed \$6,368 for damages resulting from defective work. The Superior Court, on 27th March, 1877, gave judgment in favour of St. L. for the whole amount of his claim, dismissing S's. incidental demand. This judgment was reversed by the Court of Review, on the 29th December, 1877. St. L. appealed to the Court of Queen's Bench, and on the 24th November, 1880, that court held that St. L. was entitled to the balance claimed by him, from which should be deducted the cost of rebuilding the defectively constructed work, and in order to ascertain such cost, the case was remitted to the Superior Court, by whom experts were appointed to ascertain the damage, and, on their report, the Superior Court, on the 18th June, 1881, held that it was bound by the judgment of the Court of Queen's Bench, and, deducting the amount awarded by the experts from the balance claimed by St. L., gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench, on the 19th January, 1882.

Held, on appeal, that the judgment of the Court of Queen's Bench of the 24th November, 1880, was a final judgment on the merits, and that the Superior Court, when the case was remitted to it, rightly held that it was bound by that judgment, and that St. L. was entitled to the balance thereby found due to him.

Per Fournier, J.—1. That the judgment of the 24th November, 1880, though interlocutory in that part of it which directed the reference to experts, was final on the other points in litigation, and could therefore have properly been appealed from as a final judgment.

Jurisdiction—Continued.

2. That although on an appeal from a final judgment an appellant may have the right to impugn an interlocutory judgment rendered in the cause, yet he loses this right if he voluntarily and without reserve acts upon such interlocutory judgment.

Shaw v. St. Louis.—viii. 385.

20. *New trial—Life insurance—Power of court to set aside verdict and enter another*—37 V. c. 7, ss. 32 & 33, (O.)—Ss. 264, 283, c. 50 Rev. Stats. (O.)—38 V. c. 11, ss. 20, 22.

In an action on a life policy tried before a judge and a jury, in accordance with the provisions of 37 V. c. 7, s. 32, (O.), the learned judge, in place of requiring the jury to render a general verdict, directed them to answer certain questions, and the jury having answered all the questions in favour of the plaintiff, the judge entered a verdict for the plaintiff. Upon a rule *nisi* to show cause why this verdict should not be set aside and a non-suit or a verdict entered for defendants pursuant to the "Law Reform Act," or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendants, the Court of Queen's Bench made the rule absolute to enter a verdict for the defendants. The appellant then appealed to the Court of Appeal for Ontario, and the court being equally divided, the appeal was dismissed.

Held, Taschereau, J., dissenting, that the Court of Queen's Bench had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants in direct opposition to the finding of the jury on a material issue. That the court below might have ordered a new trial upon the ground that the finding of the jury upon the questions submitted to them was against the weight of evidence, but they exercised their discretion in declining to act, or in not acting, on this ground; and therefore no appeal to the Supreme Court of Canada would lie on such ground, under s. 22, 38 V. c. 11.

That if an amendment to a plea was authorized by the court below, but such amendment was never actually made, the Supreme Court has no power to consider the case as if the amendment had in effect been made. [But see Supreme and Exchequer Courts Amendment Act, 1880.]

Per Gwynne, J.—That the plaintiff never could have been non-suited in virtue of 37 V. c. 7, s. 33 (O.), as it is only where it can be said that there is not any evidence in support of the plaintiff's case, that a non-suit can be entered; and that in this case, the proper verdict which the law required to be entered upon the answers of the jury was one in favour of the plaintiff.

[This case was appealed, and the Lords of the Judicial Committee of the Privy Council affirmed the first holding of the Supreme Court. As to the second holding, it was held that the Supreme and Exchequer Court Act, s. 38, gives the Supreme Court power to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power was not taken away by s. 22 in this case in which the court below did not exercise any discretion as to the question of a

Jurisdiction—Continued.

new trial, and where the appeal from their judgment did not relate to that subject. *See* Report of Case 6 App. Cases, 644. The judgment of the Judicial Committee will also be found printed as an appendix to the Supreme Court Report. *See* also Report of Case in 41 U. C. Q. B. 497, and in 3 Ont. Appeal Rep. 331.]

Moore v. The Connecticut Mut. Life Ins. Co.—vi. 634.

20 (a). As to new trial on Criminal Appeal.

See NEW TRIAL, 7.

21. Appeal—Final judgment—Demurrer—Supreme and Exchequer Court Act, 1875—S. C. Am. Act, 1879—Case defective, not having formal judgment—Costs as of motion to quash.

Action for assault and false imprisonment. The defendants by their second plea justified the assault, etc., by virtue of a writ of *capias ad satisf.* issued against the plaintiff under a judgment recovered against him.

To this plea the plaintiff by his second replication alleged that the *capias* was issued and delivered to the defendant's attorney in blank and filled up with the necessary particulars after the sealing and delivering.

And by a fourth replication to the second plea the plaintiff alleged that the writ was sealed, issued and delivered without any *proceipe* therefor having been filed with the prothonotary.

To these replications the defendants demurred. To the fourth replication the defendants pleaded a second rejoinder to the effect that forthwith after the issuing of the writ the attorney of the defendants having duly paid the legal fees transmitted to the prothonotary a sufficient and proper *proceipe*.

To this second rejoinder the plaintiff demurred.

Judgment was rendered for the plaintiff on all the demurrers by the Supreme Court of Prince Edward Island.

The defendants appealed to the Supreme Court of Canada, and the printed case contained, in addition to the demurrer book, and the reasons for judgment, a certified extract from the minutes of the prothonotary of the entry of the judgment delivered by the court on the demurrers :

"Demurrers argued 30th October last, when the court took time to consider. The Chief Justice now gives judgment for the plaintiff on all the demurrers. Mr. Justice Peters, concurs; Mr. Justice Hensley, concurs."

Held, 1. The case was defective in not showing that a judgment had been entered up on the demurrers.

2. Even if judgment had been entered up such judgment would not be a final judgment from which an appeal would lie within the meaning of the Sup. & Ex. Ct. Act, 1875, or the Sup. Ct. Amend. Act of 1879.

Appeal quashed with costs of a motion to quash. The objection to the jurisdiction was taken by the respondent in his *factum*.

Reid et al. v. Ramsay.—6th June, 1879.

Jurisdiction—Continued.**22. *New trial—Damages, excessive—Discretion—S. 22 S. C. Act, 1875—S. 4, S. and Ex. C. Am. Act, 1880—Costs.***

The plaintiff declared on a special contract for the sale of a vessel by the plaintiff to the defendant, averring the performance by the appellant of all conditions precedent necessary to entitle the plaintiff to the payment by the respondent of the agreed price of the said vessel, and assigning as a breach the non-payment of the said price by defendant. The plaintiff further declared on the common counts.

The defendant pleaded non-assumpsit, non-delivery of the vessel, payment and set-off.

The cause was tried before the chief justice of Nova Scotia and a jury at Amherst, in June, 1878. The jury found a verdict for plaintiff for \$3,000. A rule nisi was thereupon taken out to set aside this verdict, and this rule the court below made absolute on the ground that the damages were excessive, observing that it was unnecessary to decide whether the verdict was objectionable on other grounds.

On appeal to the Supreme Court of Canada, **Held**, on motion to quash, Henry, J., *dubitante*, that the judgment of the court ordering a new trial on the ground of excessive damages, proceeded upon matter of discretion only, and that such judgment was not appealable. [But see now R. S. C. c. 135, s. 24 (d) as amended by 54 & 55 V. c. 25.]

Appeal quashed with the general costs of appeal to hearing. By fiat of Taschereau, J., a counsel fee of \$50 on motion was taxed.

McGowan v. Mockler.—13 October, 1879.

23. *Appeal quashed for want of jurisdiction—Verdict against weight of evidence—S. 20 & 22 Sup. C. Act—Costs.*

Appeal from a judgment of the Supreme Court of New Brunswick, making absolute a rule to set aside a verdict for the defendants, and for a new trial, on the several grounds of improper reception of evidence, misdirection, and because the verdict was against the weight of evidence.

Held, that the court below having proceeded as well on the ground that the verdict was against the preponderance of the evidence, as on the law, the appeal came within s. 22 of the Supreme Court Act, and would not lie. [But see now R. S. C. c. 135, s. 24 (d) as amended by 54 & 55 V. c. 25.]

Appeal quashed for want of jurisdiction, but without costs, the appeal having been heard *ex parte*, the respondent not appearing.

Domville v. Cameron.—9th February, 1880.

24. *Conviction for violation of license laws—Habeas corpus, motion for—Judgment dismissing not appealable when prisoner is discharged before appeal—Jurisdiction—R. S. N. S. c. 75—R. S. N. S. c. 99—Appeal—Costs.*

The prisoner, Simon Fraser, had been convicted before F. A. Laurence, stipendiary magistrate for the Town of Truro, of violating the license laws in

Jurisdiction—Continued.

force in the town, and was fined \$40 and costs as for a third offence. Execution was issued in the form given in the Rev. Stats. c. 75, under which Fraser was committed to jail. While there he was convicted of a fourth offence and fined \$80 and costs, and was detained under an execution in the same form. The matter came before the Supreme Court of Nova Scotia on a motion to make absolute a rule *nisi* granted by Weatherbe, J., under c. 99 of the Rev. Stats. of (N. S.), of "Securing the Liberty of the Subject." The rule was discharged.

It appeared that before the institution of the appeal to the Supreme Court of Canada, the time for which the appellant had been imprisoned had expired and he was at large.

On motion to dismiss the appeal for want of jurisdiction, **Held**, that an appeal will not lie in any case of proceedings for or upon a writ of *habeas corpus* when at the time of bringing the appeal the appellant is at large.

Appeal dismissed. The question of costs was reserved and subsequently the court ordered that the respondent should be allowed his general costs of the appeal.

Fraser v. Tupper.—21st June, 1880.

25. Appeal—Allowance of—Security—Ont. Jud. Act, 1881, s. 43.

Where the Court of Appeal for Ontario, under s. 43 Ont. Jud. Act, 1881, refused leave to appeal to the Supreme Court of Canada, the matter in controversy being under \$1,000.

Held, that the appellant should be permitted to pay \$500 into the Supreme Court as security for the costs of the appeal. The court expressed great doubts as to the constitutionality of the section mentioned.

Forristal v. McDonald.—7th Nov. 1882.

See JURISDICTION, 72.

26. No appeal from Court of Queen's Bench (P.Q.) when case has originated in the Circuit Court (P.Q.)—No costs of appeal when objection to jurisdiction taken by the court.

This was an appeal from a judgment of the Court of Queen's Bench (P.Q.) reversing the judgment of the Circuit Court at Three Rivers, setting aside a seizure for a tax of \$10 imposed by by-law of the city of Three Rivers on strangers and non-residents selling goods by samples. The case was settled and agreed to by both parties, who took no objection to the jurisdiction.

Held, that an appeal will not lie to the Supreme Court of Canada from a final judgment of the Court of Queen's Bench (P. Q.) in cases in which the court of original jurisdiction is the Circuit Court for the Province of Quebec.

Appeal quashed for want of jurisdiction, but without costs, the objection having been taken by the court.

[This precedent was followed in the case of *The Mayor, &c., of Terrebonne, v. The Sisters of the Providence Asylum.*] (*See Jurisdiction, 42.*)

Major v. Corporation of the City of Three Rivers.—18 C. L. J. 122.

—17th Nov. 1882.

Jurisdiction—Continued.

27. *Motion to rescind an order of a Judge of the Court of Queen's Bench, Province of Quebec, made in Chambers, or to compel such Judge or Court to receive security refused—Quære as to jurisdiction to entertain appeal from Q. B., Pr. of Q., where opposition filed to seizure under execution for an amount less than \$2,000—S. C. Am. Act, 1879, s. 8.*

Bourget, the plaintiff, obtained a judgment in the Superior Court of Quebec against the defendants for a sum of \$723, and issued an execution therefor against the defendants' immoveable property, in virtue of which a certain lot and building were seized. To this seizure the defendants filed an opposition on the ground that their late father's will, under which they held this property, contained a clause prohibiting them to alienate it. To this opposition Bourget filed a contestation, but the Superior Court dismissed this contestation, and maintained the defendants' opposition, holding the prohibition to alienate in the said will legal and valid, and quashing the plaintiff's seizure of the property. The plaintiff, Bourget, appealed from that judgment to the Court of Queen's Bench, but was again unsuccessful and his appeal was dismissed.

He then applied to Mr. Justice Tessier, of the Q. B., in Chambers, for leave to appeal to the Supreme Court of Canada, but was refused, on the ground that an appeal would not lie in such a case, under s. 8 of the S. C. Am. A. Act, 1879. (*See* 9 Q. L. R. 262).

The plaintiff then made a motion in the Supreme Court of Canada, asking leave to appeal from the judgment of the Court of Queen's Bench (appeal side), and praying that the order of Mr. Justice Tessier be rescinded, and that the said judge, or any other judge of the said Court of Queen's Bench, be ordered to receive security.

Held, that the Supreme Court had no jurisdiction to grant the conclusions of the motion, even if the appellant had a right to appeal in such a case. (*See* Jurisdiction, 81),

Motion refused with costs fixed at \$25.

Bourget v. Blanchard.—29th November, 1882.

[Followed by Tessier, J., in *Martin v. Mills*, 12 Q. L. R. 98.—“Jugé : Que lorsque la question décidée par la Cour du B. de la R. est la priorité d'une créance hypothécaire au montant de \$500 seulement, il n'y a pas droit d'appel à la Cour Suprême.”]

28. *Railway acts of Nova Scotia—Railway, appraisal of lands for—Order to set aside proceedings—Estoppel—Judgment not appealable.*

This was an application to the Supreme Court of Nova Scotia asking it to set aside, in a summary manner, the whole appraisal of land damages awarded to be paid by the county to the several proprietors of lands in

Jurisdiction—*Continued.*

Pictou county, whose lands had been expropriated for the line of railway extending from New Glasgow, in Pictou county, to the strait of Canso, and known as the Eastern Extension. This appraisalment was made on the assumption that under the contract with the Nova Scotia Government for the construction of this line of railway and the statutes relating thereto, and providing for the expropriation of lands for right of way, etc., appraisalment of damages or compensation to the proprietors and payment thereof, the right of way was furnished to the company free, and the compensation for land damages was to be paid after appraisalment in the manner prescribed, by the Custos of the various counties through which the line ran issuing debentures for the amounts due to the proprietors, which debentures were to be redeemed by means of local taxation.

Before the Provincial Government of Nova Scotia had entered into the contract for the construction of the Eastern Extension Line, and while they were negotiating therefor, the Nova Scotia legislature, on the 4th April, 1876, passed c. 3 of the Acts of 1876, to enable the government to enter into a contract for the construction of this line of railway, and made provision thereby for the payment of a subsidy and grants of land to those undertaking it, and for the expropriation of land for the right of way for the line.

On the same date c. 74 of the Acts of 1876 was passed, and, in order to incorporate and give any contractors whose tender for construction should thereafter be accepted the same corporate powers and privileges as those mentioned in c. 74, s. 4 of the Acts of 1876 was passed.

By s. 36 of c. 74, and also by s. 6, c. 3, Acts of 1876, certain ss. of c. 70 of the Revised Statutes, third series, are incorporated in these enactments and made applicable to this line of railway, which sections more particularly relate to the mode of acquiring lands for the right of way, stations, etc., the procedure for appraising damages, and the mode of assessing the various counties for the payment of the amounts awarded.

Chapter 70 Revised Statutes, third series, comprises in consolidated form all enactments in force in Nova Scotia at that date, relating to provincial railways. For convenience the various railway companies in Nova Scotia, such as the Windsor and Annapolis Railway Company, the Western Counties Railway Company, (*see* c. 34, Acts of 1868; c. 81, Acts 1870) have, in obtaining their Acts of incorporation, availed themselves of similar clauses from c. 70, Revised Statutes third series, by express enactment, without repeating them in the Act or providing other machinery for the expropriation of lands, and the ascertaining of land damages.

When the Revised Statutes, 4th series, was prepared, certain Acts of the Province not re-enacted were continued in force, and among them so much of c. 70 of the third series as was therein specified. (*See* the Act to provide for the publication of the Consolidated Statutes, 30th April, 1873, Revised Statutes, fourth series, page 2.)

Mr. Harry Abbott, having entered into the contract with the Government for the construction of this line, sought, under c. 4 of the Acts of 1876, incorporation and the benefit of the provisions of c. 74, Acts 1876, and obtained a

Jurisdiction—Continued.

certificate of incorporation under the name of the Halifax and Cape Breton Railway and Coal Company.

The company was organized under this Act, and the right of way having been obtained under the statutes, the damages were appraised and the work of construction began and was carried on.

In 1877 an order was made by the Chief Justice of the Supreme Court of Nova Scotia, on the petition of a number of the property owners whose lands would be affected by the building of the railway, directing the prothonotary of the county to draw and strike a jury, under the provisions of c. 70, of the Revised Statutes, third series, to appraise the lands and property taken for the purpose of the Eastern Extension Railway.

In 1878 a rule *nisi* was taken to set the whole proceedings aside, but a year later it was discharged on motion of the party who had obtained it.

A question having been raised as to the validity of the incorporation of the company under c. 4, Acts 1876, by the Local Government, and legislation being about to be passed to remove such doubts, another rule was obtained in 1879, on the ground that the Halifax and Cape Breton Railway and Coal Company had no legal existence. After the argument of this rule, and before judgment, chs. 60 and 70 of the Acts of 1879 were passed by the Legislature of Nova Scotia. After hearing the Custos of the county by counsel before a committee of the Legislature, two sections of the Act were added in the interest of the county.

The Supreme Court of N.S. held that the County of Pictou were estopped by these statutes last mentioned from disputing the appraisement of the lands taken, and by their act in issuing debentures to parties to whom damages had been awarded for the lands appropriated to the railway, some of which had been indorsed to third parties. (*See 1 Russ. & Geldert, 448.*)

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the court below was not one from which an appeal would lie, there being no finality about the order made by the Chief Justice of the court below in 1877, which was what this appeal sought to set aside.

Hockin v. Halifax and Cape Breton Ry. & Coal Co.—29th Oct. 1880.

29. Of Supreme Court and judges thereof—In *habeas corpus*, in criminal matter.

See HABEAS CORPUS, 2, 3.

30. Demurrer—Judgment on, not final.

On appeal brought from a judgment overruling a demurrer to some of the counts of a declaration only, and not from the final judgment on the whole case.

Held, that the appeal must be quashed for want of jurisdiction, but liberty given to appeal on whole case upon certain terms. For full statement of facts *see Damages 25.*

Bank B.N.A. v. Walker.—22nd June, 1882.

Jurisdiction—Continued.

31. *Appeal from Quebec—Judgment—Supreme Court Act, 1879, s. 8—Opposition to seizure for an amount under \$2,000—Appeal quashed for want of jurisdiction—Without costs.*

The contestation in question arose on an opposition put in by the respondent to a seizure which the appellant had caused to be made of the immoveable property of the defendant in the cause in virtue of a writ of execution, based on a judgment obtained by the appellant against the defendant for \$640.

The respondent in his opposition alleged that he was a creditor of the defendant for \$31,000, and he asked the nullity of the seizure on the ground that by a certain agreement dated the 17th October, 1876, it had been stipulated that no property of the defendant should be sold without the respondent's consent. The defendant was a building society, and the respondent further alleged that the appellant, as one of the directors of the society had become a party to and ought to be bound by the agreement mentioned. This opposition was maintained by the Superior Court, and also by the majority of the Court of Queen's Bench for Lower Canada.

On appeal to the Supreme Court of Canada, **Held**, that the appeal did not come within any of the cases mentioned in 42 V. c. 39, s. 8 (Sup. Ct. Am. Act, 1879,) providing for appeals from the Province of Quebec. The demand was for a sum of money amounting only to \$640; the opposition was not for any particular sum and did not ask for the payment of the debt of \$31,000, but attacked only the seizure for \$640 and sought to interfere with the execution of a judgment for that sum; the amount in dispute therefore was this \$640, and the question of jurisdiction was governed by this amount and not by the value of property seized, although such value exceeded the sum of \$2,000. **Henry, J.**, dissenting.

Appeal quashed for want of jurisdiction, but without costs, the objection having been raised by the court.

Champoux v. Lapierre.—19th June, 1883.

32. *Final judgment—Rev. Stats. (N. S.), 4th series, c. 94, s. 56—Order of a Judge refusing leave to defend, after judgment entered by default—Procedure.*

This is an action of replevin brought in the Supreme Court of Nova Scotia by the plaintiffs against the defendant and appellant to recover one hundred and twenty-five barrels of flour. The plaintiffs were endorsees of a bill of lading of the goods sued for, which were held by the defendant as freight agent of the Intercolonial Railway at Truro.

The action was begun on the 9th day of April, A.D., 1881, and the goods were replevied and the writ was served upon the defendant on the same day.

A default was marked on the 25th April, 1881. Subsequently, on the 10th day of September, 1881, the plaintiffs' attorney caused to be issued a writ of inquiry, under which damages were assessed under the provisions of s. 56, c. 94, Rev. Stats. of Nova Scotia, fourth series.

Jurisdiction—Continued.

An order *nisi* for the purpose of removing the default and letting in the defendant to defend, was taken out on the 11th October, 1881, and, on argument, was discharged with costs by an order of Mr. Justice James, presiding at chambers.

From the last named order an appeal was had to the Supreme Court of Nova Scotia, which confirmed the judgment. (4 Russ. & Geld. 168.)

Section 75 of c. 94 of the Rev. Stats. of Nova Scotia, fourth series, enacts that it shall be lawful for the court or a judge, upon such terms as to costs or otherwise as they shall think fit, at any time within one year after final judgment, to let in the defendant in any action or appeal to defend the same upon an application supported by satisfactory affidavits accounting for his non-appearance, and disclosing a defence upon the merits with the particular grounds thereof; and affidavits shall not be received in reply unless the court or judge shall otherwise order.

On appeal to the Supreme Court of Canada, **Held**, that the judgment appealed from was not a final judgment within the meaning of s. 3 of the Supreme Court Amendment Act of 1879, and was not appealable.

Held, also, that if the court could entertain the appeal, the matter was one of procedure and entirely within the discretion of the court below, and this court would not interfere.

Appeal dismissed with costs.

Gladwin v. Cummings.—3rd November, 1883.

33. Appeal—Justice of the peace—Certiorari—Court of original jurisdiction not a superior court—No appeal.

Conviction by a justice of the peace of the defendant for selling liquor contrary to the provisions of "The Canada Temperance Act, 1878," in the Globe Hotel, in Portage La Prairie, in the county of Marquette West, in the Province of Manitoba.

The conviction and papers connected therewith were brought before the Court of Queen's Bench in Manitoba, by writ of *certiorari*, and on the papers so brought before the court, a rule *nisi* to quash the conviction was on motion granted, and was after argument made absolute.

On appeal to the Supreme Court of Canada, **Held**, that the appeal would not lie, the cause not having arisen in a Superior Court of original jurisdiction.

Appeal quashed for want of jurisdiction. The question of costs was reserved. The court subsequently determined that the respondent should have the costs of appeal, although the objection had been taken by the court.

The Queen v. Nevins.—Jan. 18th, 1884—23rd May, 1884.

Jurisdiction—Continued.

34. *Appeal—Final judgment—Supreme and Exchequer Courts Act, 1875, s. 25—Supreme Court Amendment Act, 1879, s. 9—Promissory note overdue in hands of payee—Garnishee clauses, C. L. P. Act—Payment by maker into court by order of a judge, effect of.*

An action was brought by respondent as endorsee of a promissory note made by appellants in favor of one J. A., and by him endorsed to respondent. The appellants pleaded that the amount of the note had been attached in their hands by one of A.'s judgment creditors and paid, under the garnishee clauses of the Common Law Procedure Act of P. E. I., transcripts of ss. 60 to 67 inclusive of the English C. L. P. Act, 1854. To this plea respondent demurred on the ground that the debt was not one which could properly be attached, and on the 5th February, 1883, the Supreme Court of P. E. I. gave judgment in favour of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages, for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellants then appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellant should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from that date; but,

Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case from which an appeal would lie to the Supreme Court.

Held, also, reversing the judgment of the court below, that an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor, under the C. L. P. Act, and payment by the garnishee of the amount to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge.

Roblee v. Rankin.—xi. 137.

35. *In matter of procedure Court of Appeal should not interfere—Amended pleas, motion to add—Insufficiency of affidavit—Staying proceedings on interlocutory judgment—C. C. P. Art. 1120, C. S. L. C. c. 77, s. 26.*

Respondent sued appellant on his promissory note, and the action was returned into court on the 22nd June, 1883.

On the 6th of July, 1883, appellant filed a plea of payment. On the 3rd September, 1883, the case was inscribed for proof and hearing at the same time, under Art. 243 of the C. C. P. L. C., for the 17th day of September, 1883.

On the 14th September, 1883, appellant served a motion for permission to file new pleas, on the respondent's attorney.

This motion was made on the 17th September and refused by the court on the 18th, the day following.

Jurisdiction—Continued.

The reasons given by the Superior Court, in the interlocutory judgment for refusing appellant's demand, was the insufficiency of the affidavit in support thereof.

The appellant served notice of his intention to appeal from this interlocutory judgment to the Court of Queen's Bench.

On the 20th September, 1884, the respondent moved for and obtained judgment from the Superior Court, and this judgment was affirmed by the Court of Queen's Bench for Lower Canada (appeal side) on the 8th of February, 1884.

On appeal to the Supreme Court of Canada, *Held, per Ritchie, C.J., and Strong and Taschereau, JJ.*, that on a question of procedure the court should not interfere.

Per Fournier and Henry, JJ.—The affidavit filed by the appellant in support of his amended plea was insufficient, not being sufficiently positive and precise.

Per Taschereau, J.—Only a rule for leave to appeal would have the effect of staying proceedings, not a mere service of a motion for leave to appeal (Art. 1120 C. C. P. and C. S. L. C. c. 77, s. 26.)

Appeal dismissed with costs.

Dawson v. Union Bank.—17th February, 1885.

**36. Judgment—On an opposition claiming less than \$2,000—
Supreme Court Act, 1879, s. 8—Quebec, appeal from—
Costs.**

The appellants, being creditors of the late Isaac Gouverneur Ogden, Sheriff of the District of Three Rivers, sued and obtained a judgment on the 16th March, 1874, against his sole heir, Isaac Low Evans Ogden, for \$528.88, with interest.

The latter having died, the appellants recovered another judgment, on the 18th January, 1881, declaring that the former could be enforced by execution against his representative, Charles Kinnis Ogden, to the extent of \$231, with interest and costs.

By virtue of the last judgment, the appellants caused to be made a seizure of an immoveable derived from the succession of Sheriff Ogden by Isaac Low Evans Ogden, and from the succession of the latter by Charles Kinnis Ogden.

The respondents contested the seizure of that lot of land, by an opposition *à fin de distraire*.

They alleged in their opposition, that Isaac Low Evans Ogden had sold them the land seized, for the price of \$2,000 paid cash, and they prayed that they might be declared the true owners and proprietors of the said lot of land, and that the seizure of it might be annulled and set aside.

The appellants contested this opposition, pleading several pleas, impugning the alleged sale and the title of the respondents to the land in question.

Jurisdiction—Continued.

On appeal to the Supreme Court of Canada from the judgment rendered by the Court of Queen's Bench for Lower Canada, reversing the judgment of the Superior Court on this contestation, **Held**, that the opposition having been filed in a suit in which the amount in dispute was less than \$2,000, the appeal would not lie. (*Macfarlane v. Leclaire*, 15 Moo. P. C. C. 181, referred to; also *Champoux v. Lapierre*). (See Jurisdiction 31.)

Appeal quashed for want of jurisdiction, but without costs, a motion to quash not having been made at the earliest convenient moment.

Gendron v. McDougall.—4th March, 1885.

**37. Judgment by Court of Appeal quashing interim injunction—
Not appealable.**

In this case, on the 1st September, 1883, Mr. Justice Torrance, of the Superior Court for Lower Canada, ordered the issue of a writ of injunction, returnable on the 30th day of October, then next, enjoining the respondents and certain other persons named from issuing or dealing with certain bonds until otherwise ordered by the said court or a judge thereof.

About the 13th November, 1883, the Canada Atlantic Railway Company presented a motion to quash the injunction. On the 13th December following, Mr. Justice Mathieu, of the Superior Court, declared that the said writ of injunction had been issued without reason (*sans cause*) and he suspended it until the final adjudication of the action on the merits.

Both the appellants and respondents appealed from this judgment to the Court of Queen's Bench (appeal side), which court on the 21st of January, 1885, rendered judgment quashing the injunction absolutely.

On the 9th of February following, the appellants gave notice of their intention to appeal to the Supreme Court of Canada, and on the 19th February presented a petition to Mr. Justice Monk, one of the judges of the Court of Queen's Bench, for the allowance of the appeal. On the 20th of February Mr. Justice Monk rendered judgment, refusing to allow the appeal on the ground that the judgment quashing the writ of injunction was not a final judgment, and, "notwithstanding the offer and sufficiency of the security." On the 27th of February the appellants, by their attorneys, served notice of their intention to move before a judge of the Supreme Court to be allowed to give proper security to the satisfaction of that court, or of a judge thereof, for the prosecution of their appeal to that court, notwithstanding the refusal of the court below to accept said security, and notwithstanding the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal.

This motion came before Mr. Justice Henry, in chambers, on the 5th March, who enlarged it into court, and it was on the same day argued at length before the court.

Jurisdiction—Continued.

Held, that the judgment of the Court of Queen's Bench (appeal side), quashing the interim injunction, was not a final judgment from which an appeal would lie. Motion refused.

Stanton v. Canada Atlantic Ry. Co. (21 C.L.J. 355), 18th March, 1885.

38. *Interim injunction obtained ex parte—Order dissolving—No appeal from—Trespass—Appeal.*

This was an action of trespass, brought by the plaintiff against the defendants on the 10th of October, 1884, and in the statement of claim the plaintiff claimed damages for the alleged acts of trespass, and an injunction to restrain the defendants from proceeding with the digging of trenches and laying of pipes.

An *ex parte* restraining order was granted by the Chief Justice of Nova Scotia, on the application of plaintiff's counsel without notice to the defendant, and on the affidavit of the plaintiff alone.

On the 18th day of October notice of motion was served on the plaintiff to set aside said restraining order, and on argument of the motion before Mr. Justice Thompson, an order passed on the 25th day of October, 1884, dissolving said injunction.

From this order the plaintiff appealed to the Supreme Court of Nova Scotia *in banco*. On the 24th day of January, 1885, that court made an order dismissing the said appeal.

On appeal to the Supreme Court of Canada, **Held**, on the merits, that the order of the Supreme Court of Nova Scotia should not be interfered with.

Appeal dismissed with costs.

Kearney v. Dickson.—8th May, 1885.

39. *New trial ordered by Court below—Verdict against weight of evidence.*

Held, that the Supreme Court will not hear an appeal where the court below, in the exercise of its discretion, has ordered a new trial on the ground that the verdict is against the weight of evidence.

Eureka Woollen Mills Co. v. Moss.—xi. 91.

See also JURISDICTION, 63.

39. (a). Where the Supreme Court of Nova Scotia ordered a new trial on the ground that no insurable interest was shewn in the plaintiff who had brought an action on a policy of insurance, the appeal was heard.

Howard v. The Lancashire Ins. Co.—xi. 92.

Jurisdiction—Continued.

40. Action for instalment of church rates, under \$2,000—Not appealable.

On the 27th June, 1874, by deed executed before notary, duly registered, Joseph Ross Hutchins sold to Henri Girard a property therein described for the sum of \$24,000, which was made payable on the terms mentioned in the deed.

By deed executed before notary on the 19th January, 1876, and duly registered, Joseph Ross Hutchins transferred to Walter Bonnel, the said sum of, \$24,000.00, and by deed executed before notary on the same day, and duly registered, the said Walter Bonnel transferred to the Bank of Toronto, the appellants, the said sum of \$24,000.00.

This amount represented the claim of the said Joseph Ross Hutchins against the said Henri Girard for the price of the property, and a hypothec of *baillieur de fonds* to wit: the first privilege and mortgage upon the said property. Henri Girard being incapable of paying the said sum so transferred, together with the interest, transferred to the Bank of Toronto, by deed of the 1st of June, 1880, all right of property which he had in the said immoveable, on payment of the amount due to the Bank of Toronto, the said Henri Girard being discharged of all personal liability for the payment of the consideration money.

The said Joseph Ross Hutchins was not a Catholic, nor the said Bonnel. Whilst the said Henri Girard held the said real estate, the trustees of the Catholic Church of the Parish of La Nativité de la Ste. Vierge, obtained the right to impose a tax on the real estate of the Catholics of the parish, wherein the said immoveable property is situate.

The respondents claimed, by their action, the sum of \$165.82, the first instalment of this tax, on the ground that the said Henri Girard had been the proprietor of the property in question during his occupancy and reputed ownership of the same.

Held, that the case did not come within s. 8 of 42 V. c. 39 S. C. Am. Act, 1879 and was not appealable.

Per Fournier, J.—The action being hypothecary, concluding in the alternative, either for payment of the sum of \$165.82 or for the *délaissement* of the immoveable, the value of the immoveable could not affect the right of appeal. The rights of the respondent in the immoveable did not exceed the sum which he claimed. The action is to obtain payment only of the sum of \$165.82, demanded by virtue of a personal obligation, and the Supreme Court has no jurisdiction to entertain an appeal in a personal action under \$2,000, under the proviso of s. 17 of the S. & E. C. Act, unless the case falls within one of the class of cases mentioned in s. 8 of the S. C. A. Act, 1879, which this case did not. The only question here was the personal obligation of the respondent to pay the \$165.82 for a church rate imposed by the levy (*répartition*) of a fixed sum, the payment of which was to be made by two annual instalments. This tax, although in the nature of a hypothec and privilege on the land, has not the character of a permanent charge, it is only temporary and cannot be

Jurisdiction—Continued.

repeated yearly like rents, or the duties or revenues due to Her Majesty, which are of a permanent nature; and it is not "a duty," which expression can apply only to duties due to Her Majesty; nor has the demand any relation to titles concerning lands or tenements; and as the tax was payable in two years it was evident the judgment in no way compromised future rights.

Per Taschereau, J.—From the Province of Quebec four cases only are appealable:—1. Any case wherein the matter in controversy amounts to the sum or value of \$2,000; 2. Any case wherein the matter in controversy involves the question of the validity of an Act of Parliament, or of any of the Local Legislatures; 3. Any case wherein the matter in controversy relates to any fee of office, or any duty, or rent, or revenue payable to Her Majesty, or any sum of money payable to her Majesty, where the rights in future might be bound. These last words must be read as qualifying all this third class as well as the next. If, for instance, a fee of office is claimed, but the right to it is denied by the defendant, the case is appealable. But if in an action for a fee of office the defendant pleads payment, the case is not appealable, if under \$2,000; 4. Any case wherein the matter in controversy relates to any title to lands, or tenements, or title to annual rents, or such like matters or things where the rights in future might be bound.

It is evident that this case does not fall within any of the three first classes. Though the value of the immovable in question may be over \$2,000, it is the amount claimed in an hypothecary action, which is in controversy, and here it is clearly below the appealable amount. The title to the lands is not disputed, nor in controversy, nor do the words "such like matters, or things where the rights in future might be bound," support the appeal. The right of the plaintiffs to tax the property as they have done is not disputed here, nor is its liability to future taxation in contestation. And the fact that the taxes claimed are payable by instalments, some of which may not yet be due, cannot render the case appealable. The present liability of the bank, or rather the heir on this property is the only matter of controversy. It is *debitum in presenti, solvendum in futuro*. The case of *Savageau v. Gauthier*, L. R. 5 P. C. 494, is in that sense.

Ritchie, C.J. and Henry and Gwynne, JJ., concurred.

Appeal quashed for want of jurisdiction, but without costs, the objection having been taken by the court.

Bank of Toronto v. Le Cure et les Marguilliers, etc., of the Parish of the Nativity.

—8th March, 1886.—xii. 25.

41. Appeal—Rights in future—S. C. A. Act, 1879, s. 8.

One Duhaime, being desirous of establishing a cheese factory in the town of Montmagny, an agreement was entered into between himself of the first part and the defendant and certain others of the second part, whereby the parties of the second part agreed to furnish for twenty years all the milk of their cows to the said Duhaime, to be manufactured into cheese, Duhaime to receive a percentage for manufacturing.

Jurisdiction—Continued.

By certain *meuse* conveyances the plaintiff became proprietor of the cheese factory and vested with all the rights of Duhaime.

The defendant, among others, contrary to the agreement, sold his milk to an opposition factory, whereupon the plaintiff brought an action of damages against defendant in the Circuit Court of the Province of Quebec. By a judgment of the Superior Court for the Province (Angers, J.) the action was evoked into the Superior Court on the ground that a matter affecting future rights was in question. The Superior Court, by its judgment, held that the plaintiff was entitled to \$8.51 as damages for the breach of the agreement by the defendant.

On appeal to the Court of Queen's Bench that court reversed the judgment of the Superior Court and dismissed the plaintiff's action. The plaintiff thereupon applied to a judge of the Court of Queen's Bench (Tessier, J.), for leave to appeal to the Supreme Court of Canada. This was refused on the ground that the future rights invoked were for a limited time, and that these rights multiplied by their duration would not reach the amount required for an appeal to the Supreme Court.

On application to Gwynne, J., of the Supreme Court, in chambers, for leave to appeal and give the necessary security, the learned judge

Held, that he considered the case similar to one of a contract for payment of a sum by certain instalments to an amount of \$170.20 in all, and, apart from the amount sought to be recovered, not coming within the words "rights in future," as used in s. 8 of the Supreme Court Amendment Act of 1879, so as to give an appeal to the Supreme Court of Canada.

Beaubien v. Bernatchez.—13th March, 1886.

42. Order made in chambers setting aside judgment—Not appealable—Conclusive as to statements in it.

Where an order was granted by Wilson, C.J., in chambers, and affirmed by the C. P. Division of the High Court of Justice for Ontario, setting aside a judgment and all proceedings thereon.

Held, that it is doubtful if an appeal would lie in such a case to the Supreme Court of Canada, and the statement in the order as to what took place before the Chief Justice and as to the matter which was submitted to and argued before him, must be taken to be conclusive.

[For full statement of the facts and judgment see *Judgment 6.*]

Schroeder v. Rooney.—9th April, 1886.

43. Circuit Court, (P.Q.)—No appeal where action has originated in.

The appellants by an action returnable and returned before the Circuit Court in and for the district of Terrebonne the 30th November, 1883, claimed from the respondents a sum of one hundred and twenty-five dollars and interest thereon, at the rate of ten per cent., being the amount of taxes imposed and levied upon the real estate (immovables) of which the said respondents were in possession for the year 1883.

Jurisdiction—Continued.

Counsel for respondents moved to quash appeal for want of jurisdiction, on the ground that no appeal lies to the Supreme Court of Canada when the action has originated in the Circuit Court of the Province of Quebec. He relied on s. 8 of the Supreme Court Amendment Act of 1879, which says: "An appeal shall lie from final judgments only in actions . . . originally instituted in the Superior Court of the Province of Quebec." He cited *Major v. Corporation of Three Rivers* (See Jurisdiction, 26). Counsel for appellants contended that in the district of Montreal and some other districts an action like the present, in which future rights would be bound, would be brought in the Superior Court, and only by virtue of a special statute was it brought in the Circuit Court in the district of Terrebonne; that such statute was applicable to only some of the districts of the province, and that if the contention of the counsel for appellants was correct, the anomaly would arise that in such a case if the action were brought in one district there would be no appeal, while, if brought in another district, there would be an appeal. He argued that in this case, therefore, the Circuit Court must be considered as substituted for and in lieu of the Superior Court.

Held, that the statute was clear, and in no case would an appeal lie in an action which originated in the Circuit Court. *Major v. Corporation of Three Rivers* (See Jurisdiction, 26) followed.

Motion granted and appeal quashed with costs. The objection to the jurisdiction was taken by the respondents in the factum.

Le Maire et les Conseillers de Terrebonne v. Les Sœurs de la Providence.
—18th May, 1886.

44. *Appeal—S. C. Am. Act, 1879, s. 8—Duty payable to the Crown—Future rights,*

Appeal from Queen's Bench (appeal side), Province of Quebec.

Motion to quash appeal on ground that amount involved (\$222.80) was below \$2,000, and that the case did not come within any of the exceptions provided for in 42 V. c. 39, s. 8, Supreme Court Amendment Act, 1879, allowing an appeal in cases involving less than \$2,000.

The actions (two, combined at the trial,) which constituted the case in appeal, were brought by Darling, an importer of crockery, etc., against the collector of customs at Montreal for the recovery of the difference on duty between 20 per cent. and 30 per cent. *ad valorem* duty on dutiable value of certain importations made by Darling of earthenware crockery known in the trade as "printed ware."

The Tariff Act of 1879, 42 V. c. 15, schedule A, imposed a duty of 30 per cent. *ad valorem* duty on "earthenware, white granite or iron stoneware, and 'C. C.' or cream coloured ware." This was the only enumerated class of goods under which the appellant's goods in question could come. At the end of the schedule all enumerated goods and goods not declared free from duty were subjected to a duty of 20 per cent. The collector (Ryan) insisted upon duty being paid by appellant on his goods as coming under the class enumerated as

Jurisdiction—Continued.

above, "earthenware, white granite," etc., whilst the appellant insisted that they should not be classified, but come under the unenumerated class, and should only pay duty at 20 per cent. *ad valorem*. He, however, paid the 30 per cent. and brought the actions in question to recover the 10 per cent. back from the collector.

The importations in question were in spring and summer of 1883. Judgment was given in January, 1884, in favour of defendant. Appellant appealed therefrom to the Queen's Bench. Judgment was given dismissing appeal May, 1885. In session of 1884, 47 V. c. 30, s. 2, schedule, Parliament amended the Tariff Act as to earthenware as follows: "Earthenware, decorated, printed or spangled, and all earthenware, not elsewhere specified, 30 per cent. *ad valorem*," thus distinctly covering appellant's description of his own importations and declaring such goods subject to 30 per cent., and making it relate back to March, 1884.

Respondents contended that if before the Act of 1884 the matter in question was a proper subject of appeal to this court, by the 42 V. c. 39, s. 8, by reason of its relating to a duty or revenue payable to the Crown in respect of which the decision appealed from might affect appellant's future rights, it ceased to be such a case by virtue of the Act of 1884, because that amending Act declared distinctly that from March, 1884, and for the future, the particular class of goods in question was to be subject to a 30 per cent. duty, and that, therefore, appellant's future rights could not be affected.

Held, 1. That for all that appeared there might have been importations of the same class of goods by appellant subsequent to those in question in the appeal, and before the amendment of 1884 effected a change, in respect of which the decision in the present cases would bind appellant, and that, therefore, the case in that respect at least would still come within the meaning of 42 V. c. 39, s. 8, that is to say, being in respect of a duty payable to the Crown; the decision of which might affect the then future rights of appellant.

2. That there might be a dispute still as to whether the amending Act of 1884 expressly covered the same class of goods as were in question in this case, in order to decide which the evidence and merits would require to be discussed, and that this should not be discussed on a motion to quash.

3. That if the appellant had a right to appeal, such right could only be taken away by express and clear words, and there was nothing to show that such right was taken away.

Motion refused, with \$25 costs.

Darling v. Ryan.—18th May, 1886.

45. Jurisdiction of County Court, Halifax—Plea to—Demurrer to plea, overruled—Prohibition granted to restrain trial of cause.

See PROHIBITION, 4.

Jurisdiction—Continued.**46. Of High Court of Justice (O.), in Dominion Controverted Elections.**

See ELECTION, 16.

47. Of Maritime Court of Ontario.

See MARITIME COURT OF ONTARIO.

48. Controverted Election—Order granting application to dismiss petition on ground trial not commenced within six months—No appeal from—R. S. C. c. 9, ss. 32, 33 and 50.

See ELECTION, 26.

49. The provisions of S. & E. C. Act relating to appeals from the Province of Quebec apply to cases arising under the Petition of Right Act of that province, (46 V. c. 27).

See APPEAL, 19.

50. No appeal in proceedings by *quo warranto*.

See QUO WARRANTO.

51. *Procès verbal* by municipal council ordering improvement of road—Work done by council upon refusal of owner—Action to recover \$200 cost of same—Appealable as relating to a charge on lands by which rights in future might be bound, S. & E. C. Act, c. 135 R. S. C.—Sec. 29 (b).

See CORPORATIONS, 37.

52. *Fraudulent preference—Capias—Petition to be discharged—Judgment on—Appealable under s. 28 of c. 135, R. S. C.—Arts. 819-821, C. C. P.—Secrecy—Art. 798, C. C. P.—Promissory note discounted—Arts. 1036, 1953, C. C. P. (P.Q.).*

A writ of *capias* having been issued against McK. under the provisions of Art. 798 of C. C. P. (P.Q.), he petitioned to be discharged under Art. 819, C. C. P., and issue having been joined on the pleadings under Art. 820, C. C. P., the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench of Lower Canada (appeal side) and that court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court of Canada. On motion to quash for want of jurisdiction.

Jurisdiction—Continued.

Held, that the judgment was a final judgment in a judicial proceeding within the meaning of s. 38, c. 135 R. S. of C. and therefore appealable—Taschereau, J., dissenting. *Stanton v. Canada Atlantic Ry. Co.* (*Cassels's Dig.* 249) reviewed.

MacKinnon v. Kerosack.—xv. 111.

53. Appeal—Contempt of court—R. S. C. c. 135, s. 24 (a)—Final judgment—Practice in case of contempt.

By a rule *nisi* of the Supreme Court of New Brunswick, E. was called upon to show cause why an attachment should not issue against him, or he be committed for contempt of court, in publishing certain articles in a newspaper. On the return of the rule it was made absolute, and a writ of attachment was issued commanding the sheriff to have the body of E. before the court on a day named. By the practice in such cases in the said court it appeared that the attachment was issued merely in order to bring the party into court, where he might be ordered to answer interrogatories and by his answers purge if he could his contempt. If unable to do this the court would pronounce sentence. E. appealed from the judgment making the rule absolute. On motion to quash said appeal,

Held, that the judgment appealed from was not a final judgment from which an appeal would lie under s. 24 (a) of the Supreme and Exchequer Courts Act, R. S. C. c. 135.

Ellis v. Baird.—xvi. 147.

54. Jurisdiction—Future rights—Supreme and Exchequer Courts Act, s. 29, s-s. (b).

In an action for \$1,333.36, a balance of one of several money payments of \$2,000 each, one whereof the defendants agreed to pay to the plaintiff every year so long as certain security given by the plaintiff for the defendants remained in the hands of the government, the defendants contended that the security had been released by the action of the government and they were therefore not liable to pay the amount sued for, or any further instalments. The Court of Queen's Bench (appeal side) held that the security had not been released and gave judgment for the amount claimed. The defendants applied to one of the judges of that court and obtained leave to appeal, on the ground that if the judgment was well founded then future rights would be bound, and they had become liable for two other instalments of \$2,000 each, for which actions were pending.

Held, that the appeal would not lie, because even if the future rights of the defendants were bound by the judgment such future rights had no relation to any of the matters or things enumerated in s-s. (b) of s. 29 of the S. & E. C. Act.

The words "where the rights in future might be bound" in this s-s. are governed and qualified by the preceding words and to make a case appealable when the amount in controversy is less than \$2,000, not only must future rights be bound by the judgment, but the future rights to be so bound must

Jurisdiction—Continued.

relate to "a fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to some title to lands or tenements; or to annual rents out of lands or tenements, or to some like matters and things."

Gilbert v. Gilman.—xvi. 189.

55. Contempt of Court—Constructive contempt—Discretion of court—R. S. C. c. 135, s. 24, s-s. (a), s. 26 s-s. (1), s. 27.

The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited by s. 27 of the Supreme and Exchequer Courts Act. *Taschereau, J., dubitante.*

The Supreme Court has jurisdiction to entertain such an appeal from the judgment of the Court of Appeal of the Province, not only under s. 24, s-s. (a) of Supreme and Exchequer Courts Act as final judgment in an action or suit, but also under s-s. (1) of s. 26 of the same Act, as a final judgment "in a matter or other judicial proceeding" within the meaning of said s. 26.

The adjudication that the appellant, a solicitor and officer of the court and moved against in that quality, has been guilty of a contempt, is by itself an appealable judgment, although no sentence for the contempt has been pronounced by the court.

When the party in contempt has been ordered to pay the costs of the application to commit the court in effect inflicts a fine for the contempt.

In re O'Brien.—xvi. 197.

56. Practice—Right of appeal (P.Q.)—Amount in controversy—Supreme and Exchequer Courts Act, R. S. C. c. 135, s. 29, construction of.

Where the plaintiff has acquiesced in the judgment of the court of first instance by not appealing from the same, the measure of value for determining his right of appeal under s. 29 of the Supreme and Exchequer Courts Act is the amount awarded by the said judgment of the court of first instance, and not the amount claimed by his declaration. (*Levi v. Reed*, 6 Can. S. C. R. 482, overruled, see "Jurisdiction" 5: *Allen v. Pratt*, 13 App. Cases 780, referred to as overruling *Joyce v. Hart*, 1 Can. S. C. R. 321, see "Jurisdiction" 4.)

Monette v. Lefebvre.—xvi. 387.

57. Judicial deposit by Insurance Company—Rival claims as to same—Value of matter in controversy—Jurisdiction—Supreme and Exchequer Courts Act, R. S. C. c. 135, s. 29.

A life insurance company deposited with the prothonotary of the Superior Court, under the Judicial Deposit Act of Quebec, the sum of \$3,000, being the amount of a life policy issued by the company to one E. L., which by its terms had become payable to those entitled to the same, but to one-half of which sum rival claims were put in. The appellants, as collateral heirs of the deceased, by a petition claimed the whole of the three thousand dollars, and the

Jurisdiction—Continued.

respondent (*mise-en-cause* petitioner), the widow of the deceased, by a counter petition claimed as *commune en biens* one-half; and, in her answer to the appellants' petition, prayed that in so far as it claimed any greater sum than one-half, it should be dismissed. After issue joined, the Superior Court awarded one half to the appellants, and the other half to the respondent. From this judgment the appellants appealed to the Court of Queen's Bench (appeal side) and that court confirmed the judgment of the Superior Court. On appeal to the Supreme Court of Canada,

Held, that the sum or value of the matter in controversy between the parties being only \$1,500, the case was not appealable. R. S. C. c. 135, s. 29. (Fournier, J., *dubitante*).

Labelle v. Barbeau.—xvi. 390.

58. *Habeas corpus* proceeding—Time for appealing—Commencement of proceedings in appeal.

For the purpose of an appeal to the Supreme Court of Canada in a *habeas corpus* case the first step is the filing of the case in appeal with the registrar. The judgment of the Court of Appeal in a *habeas corpus* proceeding was pronounced on Nov. 13th, 1888. Notice of intention to appeal was immediately given but the case in appeal was not filed in the Supreme Court until Feb. 18th, 1889.

Held, that the appeal was not brought within sixty days from the date on which the judgment sought to be appealed from was pronounced and there was no jurisdiction to hear it.

In re Smart.—xvi. 396.

59. Jurisdiction—Future rights—Supreme and Exchequer Courts Act—s. 29—Municipal taxes—Special assessments.

On an appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) in an action brought to recover \$361.90, the amount of a special assessment for a drain along the property of the defendants, the respondent moved to quash for want of jurisdiction, on the ground that the matter in controversy was under \$2,000, and did not come within any of the exceptions in s. 29 of the Supreme and Exchequer Courts Act.

Held, that the case came within the words "such like matters or things, where the rights in future might be bound," in paragraph (b) of s. 29, and was therefore appealable.

Les Ecclesiastiques de St. Sulpice de Montreal v. The City of Montreal.

—xvi. 399.

60. Appeal—From Province of Quebec—R. S. C. c. 135, s. 29 (b)—Future rights.

By 38 V. c. 97 the plaintiffs were authorized to build and maintain a toll bridge on the River L'Assomption at a place called "Portage," and if the said bridge should by accident or otherwise be destroyed, become unsafe or impass-

Jurisdiction—Continued.

able, the said plaintiffs were bound to rebuild the said bridge within fifteen months next following the giving away of the said bridge, under penalty of forfeiture of the advantages to them by this act granted; and during any time that the said bridge should be unsafe or impassable they were bound to maintain a ferry across the said river, for which they might recover the tolls. The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although the plaintiffs maintained a ferry across the said river, the defendant built a temporary bridge within the limits of the plaintiff's franchise and allowed it to be used by parties crossing the river. In an action brought by the plaintiffs, claiming \$1,000 damages, and praying that the defendant be condemned to demolish the temporary bridge, on an appeal to the Supreme Court it was

Held, that as rights in future might be bound, the case was appealable under R. S. C. c. 135 s. 29 (b).

Galarneau v. Gullbault.—xvi. 579.

61. *Security for costs—Right to benefit of—Interest of third party—Discretion of court below—Jurisdiction.*

S. brought an action against J. and issued a writ of *capias*. Bail was given and special bail entered in due course, but the bail-piece was not filed, nor judgment entered against J., for some months after. On application to a judge in chambers an order was made for the discharge of the bail on account of delay in entering up judgment, and the full court refused to set aside such order. An appeal was brought to the Supreme Court of Canada entitled in the suit against J., from the judgment of the full court, and the bond for security for costs was given to J.

Held, that as the bail, the only parties really interested in the appeal, were not before the court and not entitled to the benefit of the bond, the appeal must be quashed for want of proper security.

Held, also, that the appeal would not lie as the matter was simply one of practice, in the discretion of the court below.

Scammell v. James.—xvi. 593.

62. *Expropriation of land—Order by judge in chambers as to moneys deposited—R. S. C. c. 135, s. 28.*

The College of Ste. Thérèse having petitioned for an order for payment to them of a sum of \$4,000 deposited by the appellants as security for land taken for railway purposes, a judge of the Superior Court in chambers after formal answer and hearing of the parties granted the order under the Railway Act, R. S. C. c. 109, s. 8, s-s. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada (appeal side) and that court affirmed the decision of the judge of the Superior Court.

Held, that the order in question having been made by a judge sitting in chambers, and, further, acting under the statute as a *persona designata*, the proceedings had not originated in a superior court within the meaning of s. 28

Jurisdiction—Continued.

of the Supreme and Exchequer Courts Act, and the case was therefore not appealable.

C. P. Ry. Co. v. Ste. Therese.—xvi. 606.

63. Motion for new trial—Jurisdiction—S. & E. C. Act—R. S. C. c. 135, s. 24 (d).

The defendant in an action against whom a verdict had passed at the trial moved for a new trial before the Divisional Court on the grounds of misdirection, surprise and the discovery of further evidence, and the motion was granted on the ground of misdirection (15 O. R. 544). The plaintiff appealed and the Court of Appeal held that there was no misdirection, but that the order of the Divisional Court directing the case to be submitted to another jury had better not be interfered with, the circumstances of the case being peculiar.

Held, that as the judgment of the Court of Appeal did not proceed upon the ground that the trial judge had not ruled according to law no appeal would lie to the Supreme Court of Canada from its decision.

In the *factum* of the respondents no objection was made to the jurisdiction of the Supreme Court, but it was urged that the appeal should not be entertained and that the court should not interfere with the discretion in favour of a new trial exercised by the two lower courts, the circumstances, it was contended, being stronger than those in the *Eureka Mills v. Moss*, 11 Can. S. C. R. 91.

As the appeal was quashed for want of jurisdiction the costs imposed were only costs of a motion to quash.

O'Sullivan v. Lake.—xvi. 636.

64. Appeal—Province of Quebec—R. S. C. c. 135, s. 29 (b)—Future rights—Fee of office—Collateral matter—Action for penalties—Effect of judgment—Disqualification.

To give the Supreme Court jurisdiction to hear an appeal in a case from the Province of Quebec, by virtue of s. 29 (b) of the Supreme and Exchequer Courts Act, R. S. C. c. 135, the matter relating to fee of office, where the rights in future might be bound, must be the matter really in controversy in the suit in which the appeal is sought and not something merely collateral thereto.

This clause will not give jurisdiction in a case in which the action was brought to recover penalties for bribery under the Quebec Election Act, R. S. (Q.), Art. 429, and the effect of the judgment may be to disqualify the appellant from holding office under the Crown for seven years.

Chagnon v. Normand.—xvi. 661.

Jurisdiction—Continued.

65. Action of damages for railway accident—Death of plaintiff after verdict and before judgment ordering a new trial—Abatement of action—*Actio personalis moritur cum personâ*—Lord Campbell's Act—No cause before the Court of Appeal and appeal quashed.

See ACTION, 5.

66. Action for small amount—Appeal in not to be encouraged.

See APPEAL, 41.

67. *Appeal—Final judgment—Judgment on demurrer to replication to plea.*

The judgment of a provincial court allowing a demurrer to the plaintiff's replication to one of several pleas by the defendants, which does not operate to put an end to the whole or any part of the action or defence, is not a final judgment from which an appeal will lie to the Supreme Court of Canada.

Shaw v. The Canadian Pacific Ry. Co.—xvi. 703.

68. *Appeal—Judgment of Supreme Court of North-west Territories—Court of first instance—Origin of proceedings—R. S. C. c. 135, s. 24—51 V. c. 37, s. 3 (D.).*

By an ordinance of the North-West Territories an appeal lies from the decision of the Court of Revision for adjudicating upon assessments for school rates to the district court of the school district; on such appeal being brought the clerk of the court issues a summons, making the ratepayer plaintiff and the school trustees defendants, which summons is returnable at the next sitting of the court, when the appeal is heard. The district court is now merged in the Supreme Court of the Territories.

Held, that an appeal will not lie from the judgment of the Supreme Court affirming a decision of the Court of Revision in such case, as the proceedings do not originate in a Superior Court. *R. S. C. c. 135, s. 24.*

[An appeal in such case will lie since the passing of 51 V. c. 37, s. 5, which allows an appeal from the decision of the Supreme Court of the Territories although the matter may not have originated in a superior Court.]

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau and Gwynne, JJ.

Angus v. Calgary School Trustees.—25th October, 1888. xvi. 716.

69. *Appeal—Final judgment—Jurisdiction—Discretion of court or judge—S. & E. C. Act, R. S. C. c. 135, s. 24 (a) & s. 27.*

Judgment was recovered in the suit of *Virtue v. Hayes*, brought to realize mechanic's liens, and C., the owner of the land on which the mechanic's work

Jurisdiction—Continued.

was done, applied by petition in the Chancery Division to have such judgment set aside as a cloud upon his title. On this petition an order was made allowing C. to come in and defend the action for lien on terms, which not being complied with the petition was dismissed, and the judgment dismissing it was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, that the judgment appealed from was not a final judgment within the meaning of s. 24 (a) of the S. & E. C. Act or, if it was, it was a matter in the judicial discretion of the court, from which by s. 27 no appeal lies to this court.

Present:—Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Virtue v. Hayes, In re Clark.—April 9th., 1889. xvi. 721.

70. *Appeal—Action for partition and licitation of property—Partnership—Plaintiff's interest less than \$2,000—S. & E. C. Act, R. S. C. c. 135, s. 29.*

An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, etc., in order that the proceeds might be divided according to the rights of the parties who had carried on business as partners. The judgment appealed from ordered the licitation of the factory and its appurtenances. On a motion to quash the appeal by the respondent on the ground that the matter in controversy was under \$2,000, the appellant in answer to the respondent's affidavit filed another affidavit showing that the total value of the property was \$3,000, but it being admitted that the respondent (plaintiff) claimed but one-half interest in the property it was

Held, that the matter in controversy, and claimed by the respondent, not amounting to the sum or value of \$2,000, the appeal should be quashed with costs.

Present:—Sir W. J. Ritchie, C. J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Hood v. Sangster.—Nov. 12th., 1889.—xvi. 723.

71. *Judgment, interlocutory or final—Art. 1116, C. C. P.—Amount in controversy not determined—Supreme and Exchequer Courts Act, R. S. C. c. 135, ss. 28 & 29.*

The plaintiff sued for \$5,000 as damages alleged to have been caused by the defendants. The Superior Court dismissed the action, and the Court of Review reversed that judgment and sent the case back to the Superior Court to ascertain the damages. The defendants appealed from this judgment to the Court of Queen's Bench, but that court, on motion of plaintiff, before any other proceeding on the appeal, quashed the writ of appeal on the ground that it had been issued *Je plano* and not with the permission of the Court as required by Art. 1116, C. C. P., the court being of opinion that the judgment was not a final but an interlocutory judgment within that article.

Jurisdiction—Continued.

Held, 1. A judgment of the Court of Queen's Bench for Lower Canada (appeal side) quashing a writ of appeal on the ground that such writ had been issued contrary to the provisions of Art. 1116, C. C. P., is not "a final judgment" within the meaning of s. 28 of the Supreme and Exchequer Courts Act. *Shaw v. St. Louis*, 8 Can. S. C. R. 387, distinguished.

2. The Supreme Court has no jurisdiction under s. 29 of the Supreme and Exchequer Courts Act, to hear an appeal by the defendant where the amount in controversy has not been established by the judgment appealed from. [But see *S. & E. C. Act*, 1891, 54 & 55 V. c. 25, s. 8.]

Ontario & Quebec Railway Company v. Marcheterre.—xvii. 141.

72. *Ont. Jud. Act, 1881, s. 43—Appeal to Supreme Court—Limitation of—Conditions.*

The section of the Ontario Judicature Act, 1881, (s. 43) which provides that in cases where the amount in controversy is under \$1,000 no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada, except by leave of a judge of the former court, is *ultra vires* of the legislature of Ontario and not binding on this court.

Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal.

Clarkson v. Ryan.—xvii. 251.

73. *Jurisdiction—R. S. C. c. 135, s. 41—Judgment on motion for non-suit or new trial—Notice of appeal—Extension of time for giving—Application after time has expired—Effect of order on.*

The Supreme Court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the judge has not ruled according to law," unless the notice required by s. 41 of the Supreme Court Act has been given.

An order made by a judge of the court appealed from giving the defendants "leave to appeal to the Supreme Court of Canada leaving it to plaintiffs to dispute the right of appeal in the Supreme Court," even if considered as an enlargement of the time for giving notice, will not give the court jurisdiction if no notice is given pursuant to such enlargement.

The time for giving notice under s. 41 can be extended as well after, as before the twenty days have elapsed.

Held, per Strong, J.—In s. 42 of the Act, providing that under special circumstances the court appealed from, or a judge thereof, may "allow an appeal," although the time limited therefor by previous sections has expired, the expression "allow an appeal" means only that the court or judge may settle the case and approve the security.

Vaughan v. Richardson.—xvii. 703.

Jurisdiction—Continued.**74. Judgment on motion for new trial—R. S. C. c. 135, s. 24 (d)—Construction of—Non-jury case.**

S. 24 (d) of the Supreme Court Act, R. S. C. c. 135, allowing an appeal "from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law," is applicable to jury cases only. Gwynne, J., *dubitante*.

Halifax Street Railway Co. v. Joyce.—xvii. 709.

[See now 54-55 V. c. 25 (S. & E. C. Act, 1891) s. 1, amending s. 24 of the S. & E. C. Act, R. S. C. c. 135, by striking out of paragraph (d) of said section the words "upon the ground that the judge has not ruled according to law."]

75. Amount in controversy—Supreme and Exchequer Courts Act, c. 135, s. 29—Damages—Discretion of court of first instance as to amount.

Where the plaintiff in an action for \$10,000 for damages obtains a judgment in the Superior Court for Lower Canada for \$2,000, and the defendant appeals to the Court of Queen's Bench, where the judgment is reduced below said amount of \$2,000, the case is appealable by the plaintiff to the Supreme Court, the value of the matter in controversy as regards him being the amount of the judgment of the Superior Court. Taschereau and Patterson, JJ., dissenting.

The amount of damages awarded in the discretion of the judge who tries the case in the court of first instance should not be interfered with by a court of appeal, unless clearly unreasonable and unsupported by the evidence, or there be some error in law or fact, or partiality on the part of the judge. *Levi v. Reed*, 6 Can. S. C. R. 492, and *Gingras v. Desilets*, Cassels's Digest 117, followed.

Cossette v. Dun.—xviii. 222.**76. Validity of by-law—Supreme and Exchequer Courts Act ss. 29 (a) and (b) 30 and 24 (g)—Constitutional question—When not matter in controversy.**

The plaintiff sued the defendants to recover the sum of \$150 being the amount of two business taxes, one of \$100 as compounders and the other of \$50 as wholesale dealers under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and *ultra vires* of the municipal council, and also that the statute, 47 V. c. 84 (P.Q.) was *ultra vires* of the Legislature of the Province of Quebec. The Superior Court held that both the statute and by-law were *intra vires* and condemned the defendant to pay the amount claimed. On an appeal to the Court of Queen's Bench by the defendants that court confirmed the judgment of the Superior Court as regards the validity of the statute, but set aside the tax of \$100 as not being authorized. The plaintiff thereupon appealed to the Supreme Court, complaining of that part of the judgment which declares the business tax of \$100

Jurisdiction—Continued.

invalid. There was no cross-appeal. On motion to quash for want of jurisdiction,

Held, that the appeal would not lie,—s. 24 (g) of the Supreme and Exchequer Courts Act not being applicable, and the case not coming within s. 29 of the Act, the amount being under \$2,000, no future rights within the meaning of said s. 29 being in controversy, nor any question as to the constitutionality of the Act of the legislature being raised. Strong, J., dissenting on the ground that the judgment appealed from involved the question of the validity of the Provincial Act.

The Corporation of the City of Sherbrooke v. McManamy.—xviii. 594.

77. Mandamus—Judgment on demurrer—Supreme and Exchequer Courts Act, s. 24 (g) 28, 29 & 30.

Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under s. 24 (g) of the Supreme and Exchequer Courts Act. The word "judgment" in that s-s. means the final judgment in the case. Strong and Patterson, JJ., dissenting.

Langevin v. Les Commissaires d'Ecole pour la Municipalite de St. Marc.
—xvii. 599.

78. Order for a new trial—When not appealable—Supreme and Exchequer Courts Act, ss. 24 (g), 30 & 61.

Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interest of the parties on the findings of the jury as a whole, no appeal will lie from such order which is not a final judgment and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. See Supreme and Exchequer Courts Act ss. 24 (g), 30 & 61.

Barrington v. The Scottish Union and National Insurance Co.—
xviii. 615.

See JURISDICTION, 80.

79. Saisie conservatoire—Judgment ordering a petition to quash seizure to be dealt with at the same time as the merits of the main action—R. S. C. c. 135, ss. 24-28.

A judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment of the Superior Court, which quashed on a petition a seizure before judgment, and ordering that the hearing of the petition contesting the seizure should be proceeded with in the Superior Court at the same time as the hearing of the main action, is not a final judgment appealable to the Supreme Court. R. S. C. c. 135, ss. 24 & 28. Strong, J., dissenting.

Molson v. Barnard.—xviii. 622.

Jurisdiction—Continued.

80. *New trial ordered by Court of Queen's Bench suo motu—Final judgment — Supreme and Exchequer Courts Act ss. 24, 27, 28, 29, 30 & 61.*

In an action tried by a judge and jury the judgment of the Superior Court in review dismissed the plaintiffs' motion for judgment and granted the defendants motion to dismiss the action. On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reversed, and the Court set aside the assignment of facts to the jury and all subsequent proceedings and *suo motu* ordered a *venire de novo* on the ground that the assignment of facts was defective and insufficient and the answers of the jury were insufficient and contradictory.

Held, that the order of the Court of Queen's Bench was not a final judgment and did not come within the exceptions allowing an appeal in cases of new trials, and therefore the appeal would not lie.

Accident Insurance Company of North America v. McLachlan.—xviii. 627.

81. *Application to judge in chambers to set aside a writ of summons—Final judgment.*

Application was made to a judge to set aside a writ of summons served out of the jurisdiction of the court on the grounds that the cause of action arose in England and the defendant was not subject to the process of the court, and if the court had jurisdiction that the writ was not in proper form. The judge refused the application and his decision was affirmed by the full court.

Held, Gwynne, J. *hesitante*, that the decision of the full court was not a final judgment in an action, suit, matter or any other judicial proceeding within the meaning of the Supreme Court Act, and no appeal would lie from such decision to the Supreme Court of Canada.

Martin v. Moore.—xviii. 634.

82. *Appeal—Insolvent Act of 1875—40 V. c. 41, s. 28—Effect of.*

A final judgment of the Court of Queen's Bench for Lower Canada (appeal side), upon a claim of a creditor filed with the assignee of an estate under the Insolvent Act of 1875, is not appealable to the Supreme Court of Canada, the right of appeal having been taken away by 40 V. c. 41, s. 28 (D.), *Cushing v. Dupuy*, 5 App. Cas. 409, followed.

Present:—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau Gwynne and Patterson, JJ.

Seath v. Hagar.—March 4th, 1891—xviii. 715.

83. *Appeal—Title to land—Supreme and Exchequer Courts Acts, s. 29 (b).*

In an action brought before the Superior Court with seizure in recaption under Arts. 857 & 887, C. C. P. and Art. 1624, C. C. the defendant pleaded

Jurisdiction—Continued.

that he had held the property (valued at over \$2,000) since the expiration of his lease under some verbal agreement of sale. The Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Court of Review, held that the action ought to have been instituted in the Circuit Court.

On appeal to the Supreme Court: **Held**, that as the case was originally instituted in the Superior Court and upon the face of the proceedings the right to the possession and property of an immovable property was involved, an appeal would lie. Supreme and Exchequer Courts Act, s. 29 (b) and ss. 28 & 24. Strong, J. dissenting.

Blachford v. McBain.—xix. 42.

84. Solicitor—Bill of costs—Reference to taxing master—Procedure.

It is doubtful if a decision affirming the master's ruling on taxation of a solicitor's bill of costs, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court.

O'Donohoe v. Beatty.—xix. 356.

And see SOLICITOR AND CLIENT, 7.

85. By-law—Appeal as to costs—Jurisdiction—Supreme and Exchequer Courts Act, s. 24.

Since the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:

Held, that the only matter in dispute between the parties being a mere question of costs, the court would not entertain the appeal. Supreme and Exchequer Courts Act, s. 24.

Moir v. The Corporation of the Village of Huntingdon.—xix. 363.

86. Jurisdiction—Action to set aside a *procès-verbal* or by-law—Appeal—S. 24 (g) & s. 29 of the Supreme and Exchequer Courts Act.

The Municipality of the County of Verchères passed a by-law or *procès-verbal* defining who were to be liable for the rebuilding and maintenance of a certain bridge. The municipality of Varennes by their action prayed to have the by-law or *procès-verbal* in question set aside on the ground of certain irregularities. The above was maintained and the by-law set aside.—On appeal to the Supreme Court of Canada:

Held, that the case was not appealable and did not come within s. 29 or s. 24 (g) of the Supreme and Exchequer Courts Act, no future rights within the mean-

Jurisdiction—Continued.

ing of the former section being in question and the appeal not being from a rule or order of a court quashing or refusing to quash a by-law of a municipal corporation.

County of Vercheres v. The Village of Yarennas.—xix. 365.

87. Appeal—Future rights—Title to lands—Servitude—Supreme and Exchequer Courts Act, s. 29 (b).

By a judgment of the Court of Queen's Bench for Lower Canada (appeal side) the defendants in the action were condemned to build and complete certain works and drains within a certain delay, in a lane separating the defendant's and plaintiff's properties on the west side of Peel street, Montreal, to prevent water from entering plaintiff's house which was on the slope below. The question of damages was reserved. On appeal to the Supreme Court of Canada:

Held, that the case was not appealable, there being no controversy as to \$2,000 or over, and no title to lands or future rights in question within the meaning of s. 29, s.s. (b) of the Supreme Court Act. The words title to lands in this sub-section are only applicable to a case where a title to the property or a right to the title may be in question.

The fact that a question of the right of servitude arises would not give jurisdiction.

Wheeler v. Black, (14 Can. S. C. R. 242) referred to; *Gilbert v. Gilman*, (16 Can. S. C. R. 189) approved.

Wineberg v. Hampson.—xix. 369.

88. Expropriation—R. S. Q., Art. 5164, ss. 12, 16, 17, 18, 24—Award—Arbitrators—Jurisdiction of—Lands injuriously affected—43 & 44 V. c. 43 (P.Q.)—Appeal—Amount in controversy—Costs.

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of \$1,974.25 damages and costs for land expropriated was made under Art. 5164, R. S. Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award:

Held, affirming the judgment of the courts below, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau, JJ., doubted if the amount in controversy was sufficient to give the court jurisdiction to hear the appeal, the amount of the award being under \$2,000, and to make up the appealable amount either

Jurisdiction—Continued.

interest accrued after the date of the award and after action brought or the costs taxed on the arbitration proceedings would have to be added.

The Quebec, Montmorency and Charlevoix Railway Co. v. Mathieu.

—xix. 426.

In this case Tessier, J., **Held**, that the appeal would not lie and refused to allow the security. The Registrar of the Supreme Court was of opinion the amount in controversy was the amount at the time the judgment of the court below, which was appealed from, was rendered, and this amount would be the principal money awarded together with interest up to that date (the statute providing that an award under it should bear interest) making an amount in excess of the \$2,000. As to costs the Registrar was of opinion they were incidental to the award and not in controversy within the meaning of the Supreme Court Act. On appeal to Fournier, J., the judgment of the Registrar was affirmed.

89. Final judgment—Practice—Specially endorsed writ—Order for signing judgment.

An appeal does not lie from a decision of the Court of Queen's Bench (Man.) affirming the order of a judge, made on the return of a summons to show cause, allowing judgment to be entered by the plaintiffs on a specially indorsed writ, which is not a "final judgment," within the meaning of the Supreme Court Act.

Per Patterson, J.—Such decision is a "final judgment," but the order which it affirmed was one made in the exercise of judicial discretion as to which s. 27 of the Act does not allow an appeal.

The Rural Municipality of Morris v. The London and Canadian Loan and Agency Co.

—xix. 434.

90. Supreme and Exchequer Courts Amending Act, 1891, 54-55 V. c. 25, s. 3—Appeal from Court of Review.

By s. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court in Review, Province of Quebec, in cases which, by the law of that Province are appealable direct to the Judicial Committee of the Privy Council.

A judgment was delivered by the Superior Court in Review at Montreal in favour of D., the respondent, on the same day on which the Amending Act came into force.

On an appeal to the Supreme Court of Canada taken by H. *et al.*

Held, that the appellants not having shown that the judgment was delivered subsequent to the passing of the Amending Act the court had no jurisdiction.

Quare.—Whether an appeal will lie from a judgment pronounced after the passing of the Amending Act in an action pending before the change of the law.

Hurtubise v. Desmarteau.—xix. 562.

Jurisdiction—Continued.**91. Appeal—Jurisdiction—Final judgment—Judicial discretion—R. S. C. c. 135, ss. 2 (e) & (27).**

The defendants to an action in the High Court of Justice for Ontario were made bankrupt in England, and the plaintiffs filed a claim with the assignee in bankruptcy. The High Court of Justice in England made an order restraining the plaintiffs from proceeding with their action and a like order was made by a Divisional Court judge in Ontario perpetually restraining plaintiffs from proceeding but reserving liberty to apply. This latter order was affirmed by the Divisional Court and the Court of Appeal, and plaintiffs sought an appeal to the Supreme Court of Canada.

Held, that the judgment from which the appeal was sought was not a final judgment within the meaning of the Supreme Court Act.

Held, *per* Patterson, J., that if it were a final judgment the order the plaintiffs wished to get rid of was made in the exercise of judicial discretion as to which s. 27 of the Supreme Court Act does not allow an appeal.

Maritime Bank of the Dominion of Canada v. Stewart.—xx. 105.

92. Action for call of \$1,000—Future rights—Supreme and Exchequer Courts Act, s. 29, s-s. (b).

A joint stock company sued the defendant B., for \$1,000, being a call of ten per cent. on 100 shares of \$100 each alleged to have been subscribed by B., in the capital stock of the company, and prayed that the defendant be condemned to pay the said sum of \$1,000 with costs. The defendant denied any liability and prayed for the dismissal of the action. During the pendency of the suit, the company's business was ordered to be wound up under the Winding-Up Act, 45 V. c. 23 (D.), and the liquidator was authorized to continue the suit. The Superior Court condemned the defendant to pay the amount claimed, but on appeal to the Court of Queen's Bench (appeal side) the action of the plaintiff company was dismissed. On appeal to the Supreme Court of Canada.

Held, Gwynne, J., dissenting, that the appeal would not lie, the amount in controversy being under \$2,000 and there being no future rights as specified in s-s. (b), of s. 29, c. 135 R. S. C., which might be bound by the judgment. *Gilbert v. Gilman*, 16 C. S. C. R. 189, followed.

Dominion Salvage & Wrecking Co. v. Brown.—xx. 208.

93. Action to set aside municipal by-law—Supreme and Exchequer Courts Act, s. 24 (g).

In virtue of a by-law passed at a meeting of the corporation of the city of Quebec in the absence of the mayor, but presided over by a councillor elected to the chair, an annual tax of \$800 was imposed on the Bell Telephone Company of Canada (appellant), and a tax of \$1,000 on the Quebec Gas Company. In actions instituted by the appellants for the purpose of annulling the by-law the Court of Queen's Bench for Lower Canada (appeal side) reversed the judg-

Jurisdiction—Continued.

ment of the Superior Court and dismissed the actions holding the tax valid. On appeal to the Supreme Court of Canada,

Held, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question within the terms of s. 24 (g) of the Supreme and Exchequer Courts Act providing for appeals in cases of municipal by-laws. *Varennne v. Verchères*, 19 C. S. C. R. 365; *Sherbrooke v. McManamy*, 18 C. S. C. R. 594, followed.

Bell Telephone Co. v. City of Québec; Québec Gas Co. v. City of Québec.

—xx. 230.

94. *Acquiescence in judgment—Jurisdiction—36 V. c. 81. (P.Q.)—Constitutionality—Intervention—Abandonment of appeal.*

In an action in which the constitutionality of 36 V. c. 81 (P.Q.) was raised by the defendant the Attorney-General of the Province of Québec intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention the defendant appealed to the Court of Queen's Bench (appeal side) but afterwards abandoned his appeal from the judgment on the intervention. On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench on the principal action the defendant claimed he had the right to have the judgment of the Superior Court on the intervention reviewed.

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this court.

Ball v. McCaffrey.—xx. 319.

95. *Acquiescence in judgment—Attorney at litem—Right of appeal.*

By a judgment of the Court of Queen's Bench the defendant society was ordered to deliver up a certain number of its shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for the defendant delivered the shares to the plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment,

Held, that the appeal would lie.

Per Taschereau, J.—That an attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken.

La Société Canadienne-Française de Construction de Montréal v. Daveluy.

—xx. 449.

Jurisdiction—Continued.

96. *Jurisdiction—Action in disavowal—Prescription—Appearance by attorney—Service of summons—C. S. L. C. c. 83, s. 44.*

In an action brought in 1866 for the sum of \$800 and interest at 12½ per cent. against two brothers J. S. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of J. S. D. at Three Rivers, the other defendant W. McD. D. then residing in the State of New York. On the return of the writ, the respondent filed an appearance as attorney for both defendants and, proceedings were suspended until 1874, when judgment was taken and in December, 1880, upon the issue of an *alias* writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J. S. D., saying: "Be so good as to file an appearance in the case to which the inclosed has reference, etc.," and also prescription, ratification and insufficiency of the allegations of the petition of disavowal. The petition in disavowal was dismissed. On appeal to the Supreme Court of Canada the respondent moved to quash the appeal on the ground that the matter in controversy did not amount to the sum of \$2,000.

Held, that as the judgment obtained against the appellant in March 1874, on the appearance filed by the respondent, exceeded the amount of \$2,000, the judgment on the petition for disavowal was appealable.

Held, also, that where a petition in disavowal has been served on all parties to the suit and is only contested by the attorney whose authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal.

Dawson v. Dumont.—xx. 709.

97. *Fraudulent conveyance—Action to set aside by a creditor—Amount in controversy—Appeal—Jurisdiction—R. S. C. c. 135, s. 29.*

Appeal from a decision of the Court of Queen's Bench for Lower Canada (appeal side).

In December, 1889, F. F. Ferland, a trader, sold to Gauthier, one of the respondents, certain real estate in Montreal which was mortgaged for \$7,000, or \$8,000, with a right of *reméré* for one year.

In January, 1890, F. F. Ferland made an assignment, and Ira Flatt, *et al.* creditors of Ferland in the sum of \$1,880, brought an action against Gauthier to have the deed of sale of the property which was valued at over \$11,000 set aside as made in fraud of his creditors. G. pleaded that he was willing to return the property upon payment of the sum of \$1,000 which he had advanced to F., and the courts below dismissed F. *et al.*'s action. On appeal to the Supreme Court of Canada:

Jurisdiction—Continued.

Held, that as the appellants' claim was under \$2,000 and they did not represent Ferland's creditors, the amount in controversy was insufficient to make the case appealable. R. S. C. c. 145, s. 29.

Flatt v. Ferland.—xxi. 82.

98. Appeal — Road repair — Municipal by-law — Validity of — Rights in future — Supreme and Exchequer Courts Act, s. 29 (b).

In an action brought by the respondent corporation for the recovery of the sum of \$262.14 paid out by it for macadam work on a piece of road fronting the appellants' lands, the work of macadamizing the said road and keeping it in repair being imposed by a by-law of the municipal council of the respondent, the appellants pleaded the nullity of the by-law. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) dismissing the appellants' plea :

Held, that the appellants' obligation to keep the road in repair under the by-law not being "future rights" within the meaning of s. 29 (b), the case was not appealable. *County Vercheres v. Village of Vareunes*, 19 Can. S. C. R. 365, followed, and *Reburn v. Ste. Anne*, 15 Can. S. C. R. 92, distinguished. Gwynne, J., dissenting.

Dubois v. The Corporation of the Village of Ste. Rose.—xxi. 65.

99. Appeal—Monthly allowance of \$200—Amount in controversy —Annual rent—R. S. C. c. 135, s. 29 (b)—Jurisdiction.

B. R. claimed under the will of Hon. C. S. Rodier and an Act of the Legislature of the province of Quebec, 54 V. c. 96, from A. L., testamentary executrix of the estate the sum of \$200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's daughters out of the revenues of his estate. The action was dismissed by the Court of Queen's Bench for Lower Canada, and on an appeal to the Supreme Court it was

Held, that the amount in controversy being only \$200, and there being no "future rights" of B. R. which might be bound within the meaning of those words in s. 29 (b) of the Supreme and Exchequer Courts Acts, the case was not appealable.

Annual rents in s-s. (b) of s. 29 of R. S. C. c. 135, mean "ground rents" (*rentes foncières*) and not an annuity or any other like charges or obligations.

Rodier v. Lapierre.—xxi. 69.

100. Appeal—Jurisdiction—Security for costs—S. & E. C. Act, R. S. C. c. 135, s. 46 — Final judgment—Admission of attorney.

An appeal was sought from the refusal of the Supreme Court of Nova Scotia to admit the appellant as an attorney of the court. There being no

Jurisdiction—Continued.

person interested in opposing the application or the appeal, no security for costs was given.

Held, Gwynne, J., dissenting, that the court had no jurisdiction to hear the appeal.

Per Ritchie, C.J., and Taschereau, J.—Except in cases specially provided for, no appeal can be heard by this court unless the security for costs has been given as provided by s. 46 of The Supreme and Exchequer Courts Act, R. S. C. c. 135.

Per Strong and Taschereau, JJ.—It was never intended that this court should interfere in matters respecting the admission of attorneys and barristers in the several provinces.

Per Taschereau and Patterson, JJ.—The judgment sought to be appealed from is not a final judgment within the meaning of the Supreme Court Act.

In re Cahan.—xxi. 100.

101. *Solicitor—Bill of costs—Order for taxation—R. S. O. (1887) c. 147, s. 42—Appeal—Jurisdiction—Discretion—Proceeding originating in Superior Court—Final judgment.*

By R. S. O. (1887) c. 147, s. 42, any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the High Court, or of the County Court for an order of taxation. An action was brought against school trustees, and a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The application was refused, but on appeal to the Divisional Court the judgment refusing it was reversed. There was no appeal as of right to the Court of Appeal for Ontario from the latter decision, but leave to appeal was granted and the Court of Appeal reversed the judgment of the Divisional Court and restored the original judgment refusing the application. From this last decision an appeal was sought to the Supreme Court of Canada.

Held, that the court had no jurisdiction to entertain the appeal.

Per Ritchie, C.J., Taschereau and Patterson, JJ., there was no jurisdiction because the matter was one in the discretion of the courts below.

Per Ritchie, C.J., and Taschereau, J., also because the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act.

Per Taschereau, J., because the proceedings did not originate in a Superior Court.

Held also, *per Ritchie, C.J., and Gwynne, J.*, that assuming the court had jurisdiction to entertain the appeal, the subject matter being one of taxation of costs, this court should not interfere with the decision of the provincial courts which are the most competent tribunals to deal with such matters.

Jurisdiction—Continued.

Per Ritchie, C.J., and Patterson, J., that a ratepayer is not entitled to an order for taxation under said section.

McGugan v. McGugan.—xxi. 267.

102. Solicitors' action on bill of costs—Set off—Mutual debts—Final judgment.

Held, affirming the judgment of the Court of Appeal for Ontario, that in an action by a firm of attorneys for costs due from clients, the defendant cannot set off against the plaintiffs' claim a sum paid by one of them to one of the attorneys for special services rendered by him, there being no mutuality and the payment not being for the general services covered by the retainer to the firm.

A reference was made to a taxing officer for the taxation of the bills upon which the action was brought, and the judgment appealed from was the judgment of the Court of Appeal affirming the judgment of the Divisional Court on appeal to that court from the report of the taxing officer.

Held, *per Taschereau, J.*, that the judgment appealed from was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

McDougall v. Cameron, Bleckford v. Cameron.—xxi. 379.

103. Mining lands—Bornage—Injunction—Appeal—Jurisdiction—R. S. C. c. 135, s. 29 (b).

In a case of a dispute between adjoining proprietors of mining lands, where an encroachment was complained of, and it appeared that the limits of the respective properties had not been legally determined by *bornage*, the Court of Queen's Bench (Appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.

On appeal to the Supreme Court of Canada:

Held, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound, the case was not appealable. R. S. C. c. 135, s. 29 (b).

Emerald Phosphate Co. v. Anglo-Continental Works—xxi. 422.

104. Appeal—Final judgment—Action en reprise d'instance—Art. 439, C. C. P.—R. S. C. c. 135, ss. 2, 24 & 28.

The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will dated 17th January, 1885. The respondent replied that this last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (appeal side) revers-

Jurisdiction—Continued.

ing the judgment of the Superior Court declared null and void the will of 17th January, 1885, and maintained the continuance of the original suit by respondent. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and it was

Held, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable to this court. R. S. C. c. 135, ss. 2 & 28. *Shaw v. St. Louis*, 8 Can. S. C. R. 385, followed.

Baptist v. Baptist.—xxi. 425.

105. Judgment for \$675 against Railway Co.—Opposition *à fin de charge* based on agreement to retain railway property for disbursements to amount of \$35,000—Dismissal of opposition—Motion to quash for want of jurisdiction—Case heard by court on merits without deciding question of jurisdiction.

See PLEDGE, 5.

106. *Supreme and Exchequer Courts Amending Act, 1891—54-55 V. c. 25, s. 3—Appeal from Court of Review—Case standing over for judgment—Amount necessary for right of appeal—Arts. 1178 & 1178 (a), C. C. P.*

In an action brought by the respondent against the appellant for \$2,006 which was argued and taken *en délibéré* by the Superior Court for Lower Canada, sitting in review on the 30th September, 1891, the day on which the Act 54-55 V. c. 25, s. 3, giving a right to appeal from the Superior Court in review to the Supreme Court of Canada was sanctioned, the judgment was rendered a month later in favour of the respondents. On appeal to the Supreme Court of Canada:

Held, *per* Strong, Fournier and Taschereau, JJ., that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when the case was taken *en délibéré*, and therefore the case was not appealable. (*Hurtubise v. Desmarceau*, 19 Can. S. C. R. 562, followed).

Per Gwynne and Patterson, JJ., that the case did not come within the words of s. 3, c. 25, 54-55 V., inasmuch as the judgment, being for less than £500 sterling was not a judgment which the appellant had a right to appeal to the Privy Council in England. Arts. 1178a, C. C. P.

Couture v. Bouchard.—xxi. 281.

107. *Appeal—Contempt of court—Criminal proceeding—S. & E. C. Act, R. S. C. c. 135, s. 68.*

Contempt of court is a criminal matter and an appeal to the Supreme Court from a judgment in proceedings therefor, cannot be brought unless it

Jurisdiction—Continued.

comes within s. 68 of the Supreme and Exchequer Courts Act, R. S. C. c. 135. *O'Shea v. O'Shea*, 15 P. D. 59, followed. *In re O'Brien*, 16 Can. S. C. R. 197, referred to.

The Supreme Court of New Brunswick adjudged E. guilty of contempt but deferred sentence.

Held, that this was not a final judgment from which an appeal would lie to the Supreme Court of Canada. Appeal quashed.

Present: Strong, C.J. and Fournier, Taschereau, Gwynne and Patterson, JJ.

Ellis v. The Queen.—20th February, 1898.—xxii. 7.

108. Appeal—Limitation of time—Final judgment.

On the trial in the Exchequer Court in 1887 of an action against the crown for breach of a contract to purchase paper from the suppliants the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the court and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the Supreme Court, having obtained from the Exchequer an extension of the time for appeal limited by statute and sought to impugn on such appeal the judgment pronounced in 1887.

Held, Gwynne and Patterson, JJ., dissenting, that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute and the extension of time granted by the Exchequer Court on its face only referred to an appeal from the judgment pronounced in 1891.

Held, *per* Gwynne and Patterson, JJ., that the judgment given in 1891 was the only judgment in the suit in respect to the matters put in issue by the pleadings and on appeal therefrom all matters in issue were necessarily open.

Appeals dismissed with costs unless the Crown consented to restrict its appeal to the judgment of 1891.

Present:—Strong C.J., and Fournier, Taschereau, Gwynne, and Patterson, JJ.

The Queen v. Clarke.—20th February, 1898.—xxi. 656.

109. Appeal—Trial by jury—Withdrawal from jury—Disposal of questions of fact by court—Consent of parties.

In an action against a Railway Co. for damages for an injury caused by an engine of the company, the counsel for both parties agreed at the trial as follows: "That the jury be discharged without giving a verdict, the whole case to be referred to the court which shall have power to draw inferences of fact, and if they shall be of opinion upon the law and the facts that the plaintiff is entitled to recover, they shall assess the damages and that judgment be entered as the verdict of the jury. If the court should be of opinion that the plaintiff is not entitled to recover a non-suit shall be entered." The jury were then

Jurisdiction—Continued.

discharged and the court in banc in pursuance of such agreement, subsequently considered the case and assessed the damages at \$300, considering plaintiff entitled to recover. The company sought to appeal from such decision.

By the practice of the Supreme Court of New Brunswick all questions of fact are to be tried by a jury and the court can only deal with such questions by consent of parties.

Held, Gwynne and Patterson, JJ., dissenting, that as the court took upon itself the decision of the questions of fact, in this case without any legal or other authority therefor, than the consent and agreement of the parties, it acted as quasi-arbitrators, and the decision appealed from was that of a private tribunal constituted by the parties, which could not be reviewed in appeal or otherwise, as judgments pronounced in the regular course of the ordinary procedure of the court may be reviewed and appealed from.

Held, also, that if the merits of the case were properly before the court the judgment appealed from should be affirmed.

Held, *per* Gwynne and Patterson, JJ., that the case was appealable and on the merits it appearing from the evidence that the servants of the company had done everything required by the statute to give notice of the approach of the train, the appeal should be allowed and a judgment of non-suit entered.

Present:—Strong, C. J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Canadian Pacific Railway Co. v. Fleming—20th Feb., 1893.—xxii. 33.

110. Election petitions—Separate trials—R. S. C. c. 9, ss. 30 & 50.

Two election petitions were filed against the appellant, one by A. C. filed on the 4th April, 1892, and the other by A. V., the respondent, filed on the 6th April. The trial of the A. V. petition was by an order of a judge in Chambers dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the judge in Chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial judge who on the 26th October before proceeding with the trial, dismissed the motion to have both petitions joined and proceeded to try the A. V. petition. Thereupon the appellant objected to the petition being tried then as no notice had been given that the A. C. petition had been fixed for trial and subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial judges then delivered judgment setting aside the election. On an appeal to the Supreme Court,

Held, 1st that under s. 30 of c. 9, R. S. C. the trial judges had a perfect right to try the A. V. petition separately. 2nd, that the ruling of the court below on the objection relied on in the present appeal, viz., that the trial judges could not proceed with the petition in this case because the two petitions filed had not been bracketed by the prothonotary as directed by s. 30 of c. 9, R. S. C., was not an appealable judgment or decision. R. S. C. c. 9, s. 50. (Sedgewick, J., doubting.)

Jurisdiction—Continued.

Appeal dismissed with costs.

Present: Strong, C.J., and Fournier, Gwynne, Patterson and Sedgewick, JJ.

Yaudreuil Election Case, McMillan v. Valois,—1st March, 1893.—xxii. 1.

111. Right of Appeal—54 & 55 V. c. 25—Construction of.

By s. 3, c. 25 of 54 & 55 V. an appeal is given to the Supreme Court of Canada from the judgment of the Superior Court in review (P.Q.) "where and so long as no appeal lies from the judgment of that Court, when it confirms the judgment rendered in the Court appealed from, which by the law of the Province of Quebec is appealable to the Judicial Committee of the Privy Council."

The judgment in this case was delivered by the Superior Court on the 17th November, 1891, and was affirmed unanimously by the Superior Court in review on the 29th July, 1892, which latter judgment was by the law of the Province of Quebec appealable to the Judicial Committee. The statute 54 & 55 V. c. 25 was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the Superior Court in the month of June, 1891, prior to the passing of 54 & 55 V. c. 25. On an appeal from the judgment of the Superior Court in review to the Supreme Court of Canada, the respondent moved to quash the appeal for want of jurisdiction:

Held, *per* Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 & 55 V. c. 25 does not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. *Couture v. Bouchard*, 21 Can. S. C. R. 281, followed. Taschereau and Gwynne, JJ., dissenting.

Fournier, J.—That the statute is not applicable to cases already instituted or pending before the Courts, no special words to that effect being used.

Present: Strong, C.J., and Fournier, Taschereau, Gwynne and Sedgewick, JJ.

Williams v. Irvine—May 1st, 1893.—xxii.

Jury—Crown case reserved—Question of law arising on the trial—Causing jurors to stand aside—Right to "stand aside" after panel has been perused—Writ of error.

See CRIMINAL APPEAL, 18.

2. Nova Scotia Judicature Act—Rule 476—Motion for new trial—Disposal of whole case on—Directions to jury—Observations by judge on issue of fraud not raised by pleadings—Proper case for dispensing with jury.

See PRACTICE, 19.

Jury—Continued.

3. Charge to—Misdirection—New trial—Taking accounts—Case more properly dealt with as an equity case.

See PRACTICE, 20.

4. Trespass to land—View of premises by jury—Improper conduct of defendant at view—Nominal damages—New trial—Misdirection.

See TRESPASS, 20.

5. Withdrawal of case from—Reference by consent of parties to court with power to draw inferences of fact—The court made a private tribunal from which no appeal—Practice of Supreme Court of N. B.

See JURISDICTION, 109.

Justice of the Peace—Abuse of authority by—Aggravation of damages.

See DAMAGES, 23.

2. Notice of action to.

See NOTICE, 8.

MALICIOUS ARREST.

3. Conviction by—Removal of conviction by *certiorari* into Q. B., Man.—No appeal.

See JURISDICTION, 33.

4. Conviction by Justices, in prosecution under Canada Temperance Act, 1878, s. 105—"Absent"—Meaning of.

See CANADA TEMPERANCE ACT, 1878, 6.

5. Malicious and illegal arrest and imprisonment—Conviction by J. P. for having liquors near public work—Destruction of liquors—Notice of action, sufficiency of.

See MALICIOUS ARREST.

L.

Laches—By *cestui que trust*.

See SALE OF LANDS, 5.

Land, description of—By reference to plan.

See BOUNDARY.

2. Grant of for School.

See CHARITABLE TRUST.

3. *Damages—Use and occupation of land, action for—Valuation of—Different and prospective capabilities to be considered—Quasi-delit—Prescription of two years under Arts. 2261, 2267, C. C.—Art. 1608, C. C. applicable and prescription of five years under Art. 2250, C. C.—To this tribunals bound to give effect under Art. 2188, C. C., although not pleaded.*

Action brought by the appellant, William Breakey, to recover compensation for the use of certain lands on the River Chaudiere, occupied by the firm of Henry King & Co., for storing logs, attaching booms in summer and storing booms in winter, and which were submerged by means of a dam erected by King & Co. for that purpose, and made use of for about five years as a booming ground for saw-logs coming down the river to their mills.

The declaration contained two counts; one for damages, and one for the value of the use and occupation.

The respondent pleaded by demurrer a prescription of two years as for a *quasi delit* under Articles 2261 and 2267 of the Civil Code; that the alleged works were for the efficient working of the mill, and that proceedings should have been taken under Con. Stat. L. C. c. 51, by means of arbitration, and by that statute the remedy by action was taken away.

And by her perpetual exception the respondent repeated the plea of prescription of two years; that on the 5th December, 1877, a sale by licitation of the property known as Breakey's Mills took place, and the same were purchased by John Breakey, and from the last mentioned date, the respondent Carter had nothing to do with the mills; and that no proceedings under Con. Stat. L. C. c. 51, had been adopted by appellant; respondent further pleaded the general issue.

The demurrer of the respondent setting up a prescription of two years, and the necessity of proceedings by arbitration under Con. Stat. L. C. c. 51, was dismissed by Casault, J., of the Superior Court for Lower Canada (see 7 Q. L. R. 286).

On the evidence given on the issues of fact the judge found that the appellant was entitled to \$1,600, as compensation for the use of the premises for four years, at the rate of \$400 per annum.

The Court of Queen's Bench for Lower Canada (appeal side) reduced the amount to \$200, or at the rate of \$50 per annum, being merely the value of the land for agricultural purposes.

Land—Continued.

On appeal to the Supreme Court of Canada, **Held**, that not merely the value of the property for agricultural purposes should have been considered. In valuing property its different and even its prospective capabilities should be taken into consideration (*Montreal v. Brown and Springle*, 2 App. Cases 184.) In this case not only was the keeping logs in safety a prospective use, but the actual use to which the property was put by the defendants. If land be well adapted for a particular purpose, as this was, and there are those who require it for such purpose, the value of the property is to be determined, not by what it might be worth if used for other purposes, but by the value which its exceptional adaptation to special purposes gives it in the estimation of those conversant with property of that description and capable of speaking of the value of the fair use of such property. The evidence justified the finding of the Superior Court, that the property was worth \$400 per annum.

2. That the prescription of two years under Art. 2261 of the Code, did not apply, because c. 51 of the C. S. of L. C., recognising the right of a proprietor in the case of improvement of water courses to erect works which may have the effect of damming back the water on a neighbouring property, the construction of a dam having that effect, as in this case, could not be considered a *quasi delict*, but rather as a right of servitude which gave to him who was injured by it a legal recourse for indemnity for the damage.

3. The mode of proceeding given by c. 51 of the C. S. of L. C. did not exclude the right to proceed by ordinary action.

4. Under Art. 1608 of the C. C., the respondents were to be considered lessees (*locataires*) and subject to all the rules concerning leases (*les baux*) and the annual value of their occupation should be considered the rent, none having been fixed by the parties. Therefore the appellant was subject to the prescription of five years under Art. 2250, C. C., and this prescription in virtue of Art. 2188, C. C., is one which the tribunals are bound to give effect to although not pleaded, and only set up for the first time in the respondent's factum in the Court of Queen's Bench.

Appeal allowed with costs and judgment of Superior Court varied.

Breakay v. Carter.—12th May, 1885.

4. Title to—Prescription—Arts. 503, 549, C. C.—Possession—Art. 2193, C. C.—Damage to land by construction of dam.

See RIPARIAN PROPRIETORS, 4.

5. Expropriation by railway company—Deviation—Description on map or plan—42 V. c. 9 (D.).

See RAILWAYS AND RAILWAY COMPANIES, 54.

6. Title to—Possession—Nature of—Caretaker—Statute of limitations.

See POSSESSION, 10.

Land—Continued.

7. Action for recovery of land—Conveyance by husband to wife—Setting aside as fraudulent—Statement in pleadings as to possession in wife—Sale by sheriff as against husband—Irregularities in—Trial of action after pleadings maintained on demurrer

See EJECTMENT, 5.

8. Judgment against executors on note of one of executors endorsed by testator—Sale of lands by sheriff—Purchased by executor—Possession taken of lands by devisee—Trust—Statute of limitations,

See TRUSTS AND TRUSTEES, 24.

9. Contract for exchange of—Specific performance—Time essence of contract—Waiver by entering into negotiations as to title after expiry of time.

See SPECIFIC PERFORMANCE, 7.

Landlord and Tenant—Relation of—Whether created between Mortgagor and Mortgagee by provisions in Mortgage.

See MORTGAGE, 4.

2. Lease, cancellation of, by *force majeure*.

See LEASE, 1.

3. Agreement not to distrain.

See DISTRESS.

4. *Lessee, negligence of—Fire—Civil Code—Arts. 1054, 1627, 1629.*

The defendant was, on the 7th April, 1873, in the occupation of a varnish factory, which he had leased from the plaintiff, when a fire originating in the factory consumed it as well as the adjoining premises belonging to the plaintiff. This latter brought an action to recover \$8,500 damages, occasioned by the fire, which he alleged to have taken place through the negligence of the defendant and his employees.

The Superior Court for Lower Canada (Beaudry, J.), found that the weight of evidence was that no fault could attach to the defendant or his employees, and dismissed the plaintiff's action.

The Court of Queen's Bench for Lower Canada (Ramsay and Tessier, JJ., dissenting,) reversed this finding and awarded the plaintiff \$5,000 damages and costs, holding the defendant liable under Art. 1054 of the Civil Code.

Landlord and Tenant—Continued.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Queen's Bench, Henry, J., dissenting. 1. As to the part of the building leased to defendant, there was no doubt as to his responsibility, as he had failed to account for the fire according to Arts. 1627 and 1629 of the C. C.

2. As to the buildings of the plaintiff and in his own occupation the defendant might be considered as a trespasser, on account of gross negligence in the use of dangerous materials and the neglect of the most simple precautions to guard against the accident.

Jamieson v. Steel.—29th January, 1878.

5. Elevator—Negligence of employee—Accident to one of tenants of building—Liability of landlord—Damages—Art. 1054, C. C.

See DAMAGES, 49.

6. Lease—Accident by fire—Arts. 1053, 1627, 1629, C. C.

By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, etc., as the same were at the commencement thereof, reasonable wear and tear and accidents by fire excepted." Subsequently, the appellant alleging the fire had been caused by the negligence of the respondents brought an action against them for the amount of the cost of reconstructing the premises and restoring them in good order and condition less the amount received from insurance.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), Ritchie, C.J. and Taschereau, J., dissenting, that the respondents were not responsible for the loss, as the fire in the present case was an accident by fire within the terms of the exception contained in the lease, and therefore Articles 1053, 1627 and 1629, C. C. were not applicable.

Evans v. Skelton.—xvi. 637.

7. Eviction—Entry by lessor to repair—Intent—Suspension of rent—Construction of lease.

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after, except with the consent of the lessee. An action for rent under the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time without the necessary consent whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. On the trial the jury found that no consent had been given by the lessee for such occupation and that the lessee had no beneficial use of the premises while it lasted.

Landlord and Tenant—Continued.

Held, per Taschereau, Gwynne and Patterson, JJ., reversing the judgment of the court below, 1. that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the acts and conduct of the lessee.

2. The two months' limitation in the lease had reference to the entry by the lessor to commence the repairs and not to his subsequent occupation of the premises, and the lessor having entered upon the premises within the prescribed period he had a reasonable time to complete the work and his subsequent occupation was not wrongful.

Per Taschereau and Gwynne, JJ., that assuming assent was necessary the evidence clearly showed that the lessor was on the premises after the 1st of July with the assent of the lessee; he had a right, therefore, to remain until such assent was revoked, which was never done.

Per Patterson, J., that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving the tenant of the use of a portion, does not necessarily work an eviction; a tenant may be deprived of the beneficial occupation of the premises for part of his term, by an act of the landlord which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction.

Per Ritchie, C.J. and Strong, J., approving the judgment of the court below, that the jury having negatived consent by the lessee, and the evidence showing that the acts of the landlord were of such a grave and permanent character as to indicate an intention to deprive the tenant of the beneficial enjoyment of a substantial part of the premises, they amounted to an eviction of the tenant which operated as a suspension of the rent.

Ferguson v. Troop.—xvii. 527.

8. Creation of tenancy by mortgage—Demise to mortgagor, construction of—Rent reserved—Intention to create tenancy.

See MORTGAGE, 28.

9. *Verbal lease—Expiration of—Notice to quit—Sub-tenancy—Possession by sub-tenant after expiry of original lease.*

M. by verbal agreement leased certain premises to McC. who sub-let a portion thereof. After the original tenancy expired, on November 15th, 1887, the sub-tenant remained in possession and in March, 1888, received a notice to quit from M. In June, 1888, M. issued a distress warrant to recover rent, due for said premises from McC. and the sub-tenant paid the amount claimed as rent due from McC., but not from herself to McC. More than six months after the notice to quit was given proceedings were taken by M. to recover possession of the premises from the sub-tenant.

Landlord and Tenant—Continued.

Held, that the notice to quit given to the sub-tenant, and the distress during the latter's possession on sufferance, did not work estoppel against the landlord as the tenancy had always been repudiated. (Fournier, J., dissenting).

Gilmour v. Magee.—xviii. 579.

10. *Lessor and Lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Effect of—Specific performance.*

A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued and it should be optional with the lessors either to pay for the same or to continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years when a new indenture was executed which recited the provisions of the original lease and, after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option.

Held, affirming the judgment of the Supreme Court of N. B. (28 N. B. Rep. 1) Ritchie, C.J. and Taschereau, J., dissenting, that the lessors were not entitled to a decree for specific performance.

Held, *per* Gwynne, J., that the provision in the second indenture granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.

Per Gwynne, J. Assuming that the renewal clause was incorporated in the second indenture the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could the clause would operate to make the lease perpetual at the will of the lessors.

Per Gwynne and Patterson, JJ. The option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and if the second indenture was subject to renewal the clause had no effect as there were no buildings erected during the second term.

Landlord and Tenant—Continued.

Per Gwynne, J. The renewal clause was inoperative under the statute of frauds which makes leases for three years and upwards, not in writing, to have the effect of estates at will only, and consequently there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per Ritchie, C.J. and Taschereau, J. The occupation by the lessees after the terms expired must be held to have been under the lease and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided.

Present:—Sir W. J. Ritchie, C.J. and Strong, Taschereau, Gwynne and Patterson, JJ.

Sears v. The Mayor, &c. of the City of St John.—xviii. 702.

11. Arts. 857 & 887, C. C. and Art. 1624, C. C. P.—Jurisdiction—
Title to land—S. & E. C. Act, R. S. C. c. 135, s. 29 (b.).

See JURISDICTION, 83.

12. Action to recover possession by landlord—Amount claimed—
Jurisdiction of court—Arts. 887, 888, C. C.

See PRACTICE, 34.
LEASE.

MINES AND MINERALS.

Land Owners.—Liabilities and rights of, adjoining.

See DAMAGES, 20.

Larceny.

See CRIMINAL APPEAL, 3.

**Lease.—Cancellation of—Rendering of account—Art. 19, C. C. P.
L. C.**

S. on the 1st August, 1868, transferred to appellants (plaintiffs), as trustees of S.'s creditors, his interest in an unexpired lease he had of a certain hotel in Montreal, known as the Bonaventure building, and in the furniture. On the 1st April, 1870, A. P., the proprietor, after cancelling, with the consent of all concerned, the several leases of the said building and premises, gave a lease direct for a term of ten years to one G., at \$6,000 a year, of the building, and also of the furniture belonging to S.'s creditors, and on the same day by a notarial deed, "agreement and accord," A. P. promised and agreed to pay to appellants, as trustees of S.'s creditors, whatever he would receive from the tenant beyond \$5,000 a year. In February, 1873, the premises were burned, with a large proportion of the furniture, and appellants received \$3,223 for insurance on fixtures and furniture, and \$791, being the proceeds of sale of the

Lease—Continued.

balance of the furniture saved. The lease with G. was then cancelled, and A. P., after expending a large amount to repair the building, leased the premises to L. P. & Co. for \$6,000 a year from October, 1873. Appellants thereupon, as trustee's of S.'s creditors, sued respondents representing A. P., and called upon them to render an account of the amount received from G. and L. P. & Co. above \$5,000 a year.

The Superior Court at Montreal held that the appellants were entitled to what A. P. had received from L. P. & Co. beyond \$5,000; and on appeal to the Court of Queen's Bench (appeal side) this judgment was reversed.

Held, 1. Affirming the judgment of the Court of Queen's Bench (appeal side), that the lease to G. terminated by a *force majeure*, and that the obligation of A. P. to pay appellants the sum of \$1,000 out of the said rent of \$6,000 ceased with the said lease.

2. That the fact of appellants having alleged themselves in their declaration to be the "duly named trustees of S.'s creditors," did not give them the right to bring the present action for S.'s creditors, the action, if any, belonging to the individual creditors of S. under Art. 19, C. C. P. L. C.

[But see *Porteous v. Reynar*, 18 App. Cases 120. See also *Assignment*, 6, and *Trusts and Trustees*, 15.]

Browne v. Pinsonneault.—iii. 102.

2. Of pew.

See PEWHOLDER.

3. Liability of lessee for fire.

See LANDLORD AND TENANT, 4.

4. Mining lease, application for—Right of entry—Conditions precedent—Conflicting titles to land.

See MINES AND MINERALS.

5. *Written instrument—Construction of—Lease or license—Authority to work*—8 *Anne c. 14*, s. 1.

In an indenture describing the parties as lessor and lessees respectively the granting part was as follows: "Doth give, grant, demise and lease unto the said (lessees) the exclusive right, liberty and privilege of entering at all times for and during the term of ten years from 1st January, 1879, in and upon (describing the land) and with agents, labourers and teams to search for, dig, excavate, mine and carry away the iron ores in, upon and under said premises, and of making all necessary roads, etc., also the right, liberty and privilege to erect on the said premises the buildings, machinery and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores." There was a covenant by the grantees not to do unnecessary damage and a

Lease—Continued.

provision for taking away the erections made and for the use of timber on the premises and such use of the surface as might be needed. The grantees agreed to pay twenty-five cents for every ton of ore mined, in quarterly payments on certain fixed days, and it was provided how the quantity should be ascertained. It was also agreed that the royalty should not be less than a certain sum in any year. The grantees also agreed to pay all taxes and not to allow intoxicating drinks to be manufactured on the premises or carry on any business that might be deemed a nuisance. There were provisions for terminating the lease before the expiration of the term and covenant by the lessor for quiet enjoyment. In an interpleader issue, where the lessor claimed a lien on the goods of the lessees for a year's rent due under the said indenture by virtue of 8 Anne, c. 14, s. 1:

Held, per Ritchie, C.J., and Henry and Taschereau, JJ., that this instrument was not a lease but a mere license to the grantee to mine and ship the iron ores, and the grantor had no lien for rent under the statute. **Strong, Fournier and Gwynne, JJ., contra.**

Lynch v. Seymour.—xv. 341.

6. Mining lease—Covenants—Liability to pay rent—Quantity and quality of ore found—Right of lessee to determine lease.

In a lease of mining lands the *reddendum* was as follows:—"Yielding and paying therefor unto the party of the first part one dollar per gross ton of twenty-two hundred and forty pounds of the said iron, stone or ore for every ton mined and raised from the said lands and mine, payable quarterly on the first days of March, June, September and December in each year."

The lease contained, also, the following covenants by the lessee:—"The parties of the second part for themselves, their executors, etc., covenant and agree to and with the party of the first part, her heirs, etc., that they will dig up and mine and carry away, in each and every year during the said term, a quantity of not less than two thousand tons of such stone or iron ore for the first year, and a quantity of not less than five thousand tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid." "And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter, in which more than the said quantity shall be taken, and that they will protect such openings as they shall make so as to insure the same against accident, and will indemnify the party of the first part in the event of the same happening and against all costs of prosecution and defence thereof."

There was a provision that the lessor should be at liberty to terminate the lease in case of non-payment of rent for a certain period, and if the iron ore or iron stone should be exhausted, and not to be found or obtained by proper

Lease—Continued.

and reasonable effort in paying quantities, then the lessee should be at liberty to determine the lease.

Held, affirming the judgment of the Court below, *Ritchie, C.J. and Fournier, J.*, dissenting, that this lease contained an absolute covenant by the lessee to pay the rent in any event, and not having terminated the lease under the above proviso, he was not relieved from such payment in consequence of ore not being found in paying quantities.

Palmer v. Wallbridge.—xv. 650.

7. Covenant—Care of premises—Accident by fire—Liability of lessee.

See LANDLORD AND TENANT, 6.

8. Of mining rights—Option of locating—Estoppel.

See ESTOPPEL, 13.

9. Construction of—Eviction—Entry by lessor to repair—Intent—Suspension of rent.

See LANDLORD AND TENANT, 7.

10. Creation of tenancy by mortgage—Demise clause—Construction of—Rent reserved—Intention to create tenancy.

See MORTGAGE, 28.

11. Verbal—Expiration of—Notice to quit—Possession by sub-tenant after expiry of original lease.

See LANDLORD AND TENANT, 9.

12. Lessor and lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Effect of—Specific performance.

See LANDLORD AND TENANT, 10.

13. *Lessor and lessee—Art. 1612, 1614, 1618, C. C.—Disturbance of lessee's use—Claim for reduction of rent—Trespass—Trouble de droit.*

By agreement between the G. N. W. Telegraph Co. and the M. Telegraph Co., the G. N. W. Telegraph Co. undertook for a period of 97 years, from the 1st July, 1881, to work, manage and operate the system of telegraph lines owned and operated by the M. Telegraph Co., including telegraph lines erected along the South Eastern Ry. and other railways, and to pay the M. Telegraph

Lease—Continued.

Co. quarterly during the arrangement a sum equal to the dividend at 8 p. c. upon the capital of the M. Telegraph Co. (\$2,000,000), with the further yearly sum of \$5,000 to meet office expenses.

The G. N. W. Telegraph Co. by their action averred that they had been troubled in their enjoyment of the system of telegraph lines by the C. P. R. Ry. Co. which had constructed and were operating lines of telegraph along the South Eastern and other railways in contravention of the agreements made by such railways with the M. Telegraph Co. The G. N. W. Telegraph Co. therefore claimed a reduction of rent and damages under the lessor's and lessee's articles of the code of C. P. and Art. 1612, and following of the Civil Code.

Held, affirming the judgment of the Superior Court for L. C. and the Court of Q. B. for L. C. (appeal side), and adopting the reasons for judgment of Wurtelle, J., of the Superior Court (M. L. R., 6 S. C., 94), that the alleged interference by the C. P. Ry. Co. was a mere trespass which did not constitute a *trouble de droit* and did not authorize an action for a reduction of rent under Arts 1616 & 1618, C. C.

Held, also, *per* Strong, Fournier, Taschereau and Patterson, JJ., adopting the view of the merits taken by Dorion, C.J., in the Q. B. (M. L. R. 6 Q. B. 258), that the G. N. W. Telegraph Co. by the agreement having assumed all risk of diminished income in the working of the telegraph lines transferred to them and having entered into the agreement after the C. P. Ry. Co. had obtained authority from Parliament to establish telegraph lines for the transmission of messages for the public, the action should be dismissed.

The Great North Western Telegraph Co. v. The Montreal Telegraph Company. —xx. 170.

14. Action to recover possession—Amount claimed—Jurisdiction of court—Arts. 887, 888, C. C.

See PRACTICE, 34.

15. Toll Company—Lease of tolls—Collector—Liability of company for negligence.

See NEGLIGENCE, 37.

Legatee—Universal—Particular—Liability.

See WILL, 8.

Legislature—British North America Act, 1867, s-s. 14 of s. 92.

Held, that the exclusive power of legislation given to Provincial Legislatures by s-s. 14 of s. 92, B. N. A. Act, over procedure in civil matters, means procedure in civil matters within the powers of the Provincial Legislatures.

Valin v. Langlois.—iii. 1.

Legislature—Continued.

2. *Licenses—Powers of Dominion and Provincial Legislatures to impose—Sale of liquor 37 V. c. 32 (O.)—British North America Act, 1867, ss. 91, 92—Brewer, trade of.*

S., after the passing of the Act 37 V. c. 32 (O.), intituled: "An Act to amend and consolidate the Law for the Sale of Fermented or Spirituous Liquors," then being a brewer licensed by the Government of Canada under 31 V. c. 8 (D.), for the manufacture of fermented, spirituous and other liquors, did manufacture large quantities of beer, and did sell by wholesale, for consumption within the Province of Ontario, a large quantity of said fermented liquors so manufactured by him, without first obtaining a license as required by the said Act of the Legislature Assembly of Ontario. The Attorney-General thereupon filed an information for penalties against S. On demurrer to the information the special matter for argument was that the Legislature of the Province of Ontario had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

Held, on appeal, that the Act of the Provincial Legislature of Ontario, 37 V. c. 32, is not within the legislative capacity of that Legislature.

2. That the power to tax and regulate the trade of a brewer, being a restraint and regulation of trade and commerce, falls within the class of subjects reserved by the 91st s. of the British North America Act for the exclusive legislative authority of the Parliament of Canada; and that the license imposed was a restraint and regulation of trade and commerce and not the exercise of a police power.

3. That the right conferred on the Ontario Legislature by s.s. 9, s. 92 of the said Act, to deal exclusively with shop, saloon, tavern, auctioneer and "other licenses," does not extend to licenses on brewers or "other licenses" which are not of a local or municipal character. *Regina v. Taylor*, 36 U. C. Q. B. 218, overruled, *Ritchie and Strong, JJ.*, dissenting.

Severn v. The Queen.—ii. 70.

3. License tax on merchants, traders, etc.—Power to impose—33 V. c. 4 (N.B.).

See LICENSE, 1.

4. *Queen's counsel, no power to appoint—37 V. c. 20 & 21 (N.S.), ultra vires—Letters patent of precedence, not retrospective in their effect—Great Seal of the Province of Nova Scotia—40 V. c. 3 (D.)—Appeal—Jurisdiction.*

By 37 V. c. 20 (N.S.), 1874, the Lieutenant-Governor of the Province of Nova Scotia was authorized to appoint provincial officers under the name of Her Majesty's Counsel learned in the law for the Province. By 37 V. c. 21

Legislature—Continued.

(N.S.), 1874, the Lieutenant-Governor was authorized to grant to any member of the bar a patent of precedence in the courts of the Province of Nova Scotia. R., the respondent, was appointed by the Governor General on the 27th December, 1872, under the great seal of Canada, a Queen's Counsel, and by the uniform practice of the court he had precedence over all members of the bar not holding patents prior to his own. By letters patent, dated 26th May, 1876, under the great seal of the Province, and signed by the Lieutenant-Governor and Provincial Secretary, several members of the bar were appointed Queen's Counsel for Nova Scotia, and precedence was granted to them, as well as to other Queen's Counsel appointed by the Governor General after the 1st of July, 1867. A list of Queen's Counsel to whom precedence had been thus given by the Lieutenant-Governor, was published in the *Royal Gazette* of the 27th May, 1876, and the name of R., the respondent, was included in the list, but it gave precedence and pre-audience before him to several persons, including appellants, who did not enjoy it before. Upon affidavits disclosing the above and other facts, and on producing the original commission and letters patents, R., on the 3rd January, 1877, obtained a rule *nisi* to grant him rank and precedence over all Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th December, 1872, and to set aside, so far as they affected R.'s precedence, the letters patent, dated the 26th May, 1876. This rule was made absolute by the Supreme Court of Nova Scotia on the 26th March, 1877, and the decision of that court was in substance as follows:—1. That the letters patent of precedence, issued by the Lieutenant-Governor of Nova Scotia, were not issued under the great seal of the Province of Nova Scotia; 2. That 37 V. c. 20, 21, of the Acts of Nova Scotia, were not *ultra vires*; 3. That s. 2, c. 21, 37 V., was not retrospective in its effect, and that the letters patent of the 26th May, 1876, issued under that Act could not affect the precedence of the respondent.

On the argument in appeal before the Supreme Court of Canada the question of the validity of the great seal of the Province of Nova Scotia was declared to have been settled by legislation, 40 V. c. 3 (D.) and 40 V. c. 2 (N. S.).

A preliminary objection was raised to the jurisdiction of the court to hear the appeal.

Held, 1. That the judgment of the court below was one from which an appeal would lie to the Supreme Court of Canada; (Fournier, J., dissenting.)

2. *Per Strong, Fournier and Taschereau, JJ.*—That c. 21, 37 V. (N.S.), has not a retrospective effect, and that the letters patent issued under the authority of that Act could not affect the precedence of the Queen's counsel appointed by the Crown.

3. *Per Henry, Taschereau and Gwynne, JJ.*—That the British North America Act has not invested the Legislatures of the Provinces with any control over the appointment of Queen's counsel, and as Her Majesty forms no part of the Provincial Legislatures as she does of the Dominion Parliament, no Act of any such Local Legislature can in any manner impair or affect her prerogative right to appoint Queen's counsel in Canada directly, or through

Legislature—Continued.

Her representative the Governor General, or vest such prerogative right in the Lieutenant-Governors of the Provinces; and that 87 V. c. 20 & 21, (N.S.). are *ultra vires* and void.

4. *Per Strong and Fournier, JJ.*—That as this court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case to express an opinion upon the validity of the Acts in question.

Lenoir v. Ritchie.—iii. 575.

5. *Insurance—Jurisdiction of Local Legislature over subject-matter of insurance—British North America Act, 1867, ss. 91 & 92—Statutory conditions—R. S. O. c. 162—What conditions applicable when statutory conditions not printed on the policy.*

The Citizens' Insurance Company, a Canadian company, incorporated by an Act of the Parliament of Canada, since the passing of R. S. O. c. 162, issued, in favour of P., a policy against fire which had not endorsed upon it the statutory conditions (R. S. O. c. 162), but had conditions of its own, which were not printed as variations in the mode indicated by the Act. The Queen Insurance Company, an English company, carrying on business under an Imperial Act, issued in favour of P., after the passing of R. S. O. c. 162, an interim receipt for insurance against fire, subject to the conditions of the company. The Western Assurance Company, a Canadian company, incorporated by the Parliament of Canada before Confederation, issued a policy of insurance against fire in favour of J., the conditions of the policy, which were different from those contained in R. S. O. c. 162, not being added in the manner required by the statute. The three companies were authorized to do fire insurance business throughout Canada by virtue of a license granted to them by the Minister of Finance, under the Acts of the Dominion of Canada relating to fire insurance companies. The properties insured by these companies were all situated within the Province of Ontario, and being subsequently destroyed by fire, actions were brought against the companies. The Supreme Court of Canada, after hearing the arguments in the three cases, delivered but one judgment.

Held, that "The Fire Insurance Act," R. S. O. c. 162, was not *ultra vires* and is applicable to insurance companies (whether foreign or incorporated by the Dominion) licensed to carry on insurance business throughout Canada, and taking risks on property situate within the Province of Ontario.

2. That the legislation in question, prescribing conditions incidental to insurance contracts, passed in Ontario, relating to property situate in Ontario, was not a regulation of trade and commerce within the meaning of these words in s-s, 2, s. 91, B. N. A. Act.

3. That an insurer in Ontario who has not complied with the law in question, and has not printed on his policy or contract of insurance the statutory conditions in the manner indicated in the statute, cannot set up against

Legislature—Continued.

the insured his own conditions or the statutory conditions, the insured alone, in such a case, is entitled to avail himself of any statutory condition. (Taschereau and Gwynne, JJ., dissenting.)

Per Taschereau and Gwynne, JJ.—That the power to legislate upon the subject-matter of insurance is vested exclusively in the Dominion Parliament by virtue of its power to pass laws for the regulation of trade and commerce under the 91st section of the B. N. A. Act.

[On appeal to the Privy Council, the judgment of the Supreme Court respecting the validity of the provincial statute was affirmed; the judgment of the Supreme Court on the merits was reversed: 7 App. Cases, 96.]

The Citizens', etc., Ins. Co. v. Parsons.—iv. 215.

6. *Escheat—The Escheat Act, R. S. O. c. 94, ultra vires—B. N. A. Act, ss. 91, 92, 102 & 109.*

On an information filed by the Attorney-General of Ontario, for the purpose of obtaining possession of land in the city of Toronto, which was the property of one Andrew Mercer, who died intestate and without leaving any heirs or next of kin, on the ground that it had escheated to the Crown for the benefit of the Province, and to which information A. M., the appellant, demurred for want of equity, the Court of Chancery held, overruling the demurrer, that the Escheat Act, c. 94, R. S. O. was not *ultra vires*, and that the escheated property in question accrued to the benefit of the Province of Ontario. From this decision A. F. appealed to the Court of Appeal for Ontario, and that court affirmed the order overruling the said demurrer and dismissed the appeal with costs. On an appeal to the Supreme Court the parties agreed that the appeal should be limited to the broad question, as to whether the Government of Canada or the Province is entitled to estates escheated to the Crown for want of heirs.

Held, Ritchie, C.J. and Strong, J., dissenting, that the Province of Ontario does not represent Her Majesty in matters of escheat in said Province, and therefore the Attorney-General for Ontario could not appropriate the property escheated to the Crown in this case for the purposes of the Province, and that the Escheat Act, c. 94, R. S. O. was *ultra vires*.

Per Fournier, Taschereau and Gwynne, JJ.—That any revenue derived from escheats is by s. 102 of the B. N. A. Act placed under the control of the Parliament of Canada as part of the Consolidated Revenue Fund of Canada, and no other part of the Act exempts it from that disposition.

[On appeal to the Privy Council the judgment of the Supreme Court was reversed: 8 App. Cases, 767.]

Mercer v. The Attorney-General for Ontario.—v. 538.

Legislature—Continued.**7. Taxation—Constitutional law—Tax upon filings in court—Indirect tax—Jurisdiction of Provincial Legislature—43 & 44 V. c. 9, s. 9, (Q.).**

By the Quebec Act, 43 & 44 V. c. 9, s. 9, it is enacted that "A duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever, produced and filed before the Superior Court, the Circuit Court, or the Magistrates' Court, such duties payable in stamps." The Act is declared to be an amendment and extension of the Act 27 & 28 V. c. 5, "An Act for the Collection by Means of Stamps, of Office Dues and Duties, payable to the Crown upon Law Proceedings and Registrations." By s. 3, s-s. 2, the duties levied are to be "deemed to be payable to the Crown." The appellant obtained a rule *nisi* against the prothonotaries of the Superior Court at Montreal for contempt in refusing to receive and file an exhibit unaccompanied by a stamp, as required by the Act. Upon the return of the rule the Attorney-General for the Province obtained leave to intervene and show cause.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, (appeal side) Strong and Taschereau, JJ., dissenting, that the Act imposing the tax in question was *ultra vires*, the tax being an indirect tax and the proceeds to form part of the Consolidated Revenue Fund of the Province for general purposes.

Per Strong and Taschereau, JJ., dissenting.—Although the duty is an indirect tax, yet, under ss. 65, 126 & 129 of the B. N. A. Act, the Provincial Legislature had power to impose it.

Reed v. Mousseau.—viii. 408.

[On appeal to the Privy Council, the judgment of the Supreme Court was affirmed. See *Attorney-General of Quebec v. Reed*, 10 App. Cases, 141.]

8. Provincial—Powers of—Obstructions in tidal and navigable rivers—45 V. c. 100, (N. B.), *ultra vires*—B. N. A. Act, 1867, s. 91.

Professing to act under the powers contained in their Act of incorporation, 45 V. c. 100, (N. B.), the Q. R. B. Co. erected booms and piers in the Queddy River which impeded navigation—the *locus* being in that part of the river which is tidal and navigable.

Held, that the Provincial Legislature might incorporate a boom company, but could not give it power to obstruct a tidal navigable river, and therefore the Act 45 V. c. 100, (N. B.), so far as it authorized the acts done by the company in erecting booms and other works in the Queddy River obstructing its navigation, was *ultra vires* of the New Brunswick Legislature.

Queddy River Driving Boom Co. v. Davidson.—x. 222.

Legislature—Continued.

9. *Nova Scotia—Legislative Assembly of—Power of punishing for contempt—Removal of a Member from his seat by Sergeant-at-Arms—Action of trespass for assault against Speaker and Members—Damages.*

W., a member of the House of Assembly of the Province of Nova Scotia, on the 16th of April, 1874, charged the then Provincial Secretary, without being called to order for doing so, with having falsified a record. The charge was subsequently investigated by a committee of the House, who reported that it was unfounded. Two days after the House resolved, that, in preferring the charge without sufficient evidence to sustain it, W. was guilty of a breach of privilege. On the 30th April, W. was ordered to make an apology dictated by the house, and, having refused to do so, was declared, by another resolution, guilty of a contempt of the House, and requested forthwith to withdraw until such apology should be made. W. declined to withdraw, and thereupon another resolution was passed ordering the removal of the said W. from the House by the Sergeant-at-Arms, who, with his assistant, enforced such order and removed W. W. brought an action of trespass for assault against the Speaker and certain members of the House, and obtained a verdict of \$500 damages.

Held, on appeal, affirming the judgment of the Supreme Court of Nova Scotia, that the Legislative Assembly of the Province of Nova Scotia has, in the absence of express grant, no power to remove one of its members for contempt, unless he is actually obstructing the business of the House; and W. having been removed from his seat, not because he was obstructing the business of the House, but because he would not repeat the apology required, the defendants were liable. *Kielley v. Carson*, 4 Moore P. C. C. 63, and *Doyle v. Falconer*, L. R. 1 P. C. App. 328, commented on and followed.

Landers v. Woodworth.—ii. 158.

10. *Police regulations—42 & 43 V. c. 4, s. 1 (Q)., construction of—Prohibition, writ of—Sale of liquors.*

Under the authority of the Act of the Legislature of Quebec, 42 & 43 V. c. 4, s. 1, a penal suit was, on the 20th of January, 1880, instituted against P. in the name of the corporation of Q., before the Recorder's Court of the city of Q., alleging that "on Sunday, the 18th day of January, 1880, the said defendant has not closed, during the whole of the day, the house or building in which he, the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate, etc." P. was convicted. A writ of prohibition, to have the conviction revised by the Superior Court, was subsequently issued, and upon the merits was set aside and quashed.

Held, *per Ritchie, C.J., and Strong and Fournier, JJ.*—That the provisions of the Provincial Statute, 42 & 43 V. c. 4, ordering houses in which spirituous liquors, etc., are sold, to be closed on Sundays, and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations, within the power of the Legislature of the Province of Quebec, and as

Legislature—Continued.

the complaint was clearly within the Act, the recorder could not be interfered with on prohibition.

Per Henry, Taschereau and Gwynne, JJ.—That the penalty imposed upon P. by the recorder was not authorized by the statute, even if such statute was *intra vires* of the Provincial Legislature, and that the prohibition was therefore rightly granted.

The court being equally divided, the appeal was dismissed without costs.

Poulin v. The Corporation of Quebec—ix. 185.

11. Ontario Judicature Act, 1881, s. 43—Constitutionality of.

See JURISDICTION, 25 & 72.

12. *Provincial Legislatures—Power to legislate respecting procedure and residence of judges—B. N. A. Act, s. 92, s-s. 14—Delegation of power to Lieutenant-Governor in Council “Judicial District Act, 1879,” (B.C.)—“Better Administration of Justice Act, 1878” 42 V. c. 20 (B.C.)—Act to amend same 42 V. c. 12 (B.C.)*

The case respecting the status of the Supreme Court of British Columbia, and the power of the Legislature of the Province to legislate in regard to procedure in that court, and the residences of the judges thereof referred to the Supreme Court of Canada for hearing and consideration by His Excellency the Governor General in Council under the provisions of section 52 of the Supreme and Exchequer Court Act by Order in Council bearing date the 15th day of May, 1883.

1st Question: Is the Supreme Court of British Columbia a provincial court within the meaning of the 14th sub-section of section 92 of the British North America Act?

Opinion: The Supreme Court of British Columbia is a provincial court within the meaning of the 14th sub-section of section 92 of the British North America Act.

2nd Question: Has the Legislature of the Province exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province? If not, to what extent has it such authority?

Opinion: The Legislature of the Province has exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province which come within the legislative jurisdiction of the Provincial Legislature.

3rd Question: If that Legislature can make rules to govern the procedure of that court, can it delegate this power to the Lieutenant-Governor in Council?

Opinion: The Legislature can make rules to govern the procedure of that court in all such matters as limited by the preceding answer, and can delegate this power to the Lieutenant-Governor in Council.

Legislature—Continued.

4th Question: Is the "Judicial District Act, 1879," British Columbia, within the powers of the Legislature of that Province? If so, does it apply to judges appointed before that Act came into force?

Opinion: "The Judicial District Act, 1879," is within the powers of the Legislature of that Province and does apply to judges appointed before that Act came into force.

5th Question: Are the following Acts passed by the Legislature of British Columbia, namely, the "Better Administration of Justice Act, 1878," 42 V. c. 20, 1878; 42 V. c. 12, 1879, "An Act to amend the Practice and Procedure of the Supreme Court of British Columbia, and for other purposes relating to the Administration of Justice;" 44 V. c. 1, "An Act to carry out the objects of the 'Better Administration of Justice Act, 1878,' and 'The Judicial District Act, 1879,'" so far as they relate to procedure in the Supreme Court of British Columbia within the legislative authority of the Legislature of the Province?

Opinion: So far as they relate to procedure in the Supreme Court of British Columbia, they are within the legislative authority of the Legislature of British Columbia.

Sewell v. B. Columbia Towing Co., "The Thrasher Case."—18th June, 1883.

13. Powers of Local Legislatures—Regulation of the sale of liquor—License fees—British North America Act, 1867, s. 91—41 V. c. 3, (Q.)—38 V. c. 76, (Q.)—Intra vires—By-law—Mandamus.

Held, The Quebec License Act, 41 V. c. 3, is *intra vires* of the Legislature of the Province of Quebec. (*Hodge v. The Queen*, 9 App. Cas. 117, followed.)

As this Act does not interfere with the existing rights and powers of incorporated cities, a by-law passed by the corporation of the city of Three Rivers, on the 3rd April, 1877, in virtue of its charter, 20 V. c. 129, and 38 V. c. 76, imposing a license fee of \$200 on the sale of intoxicating liquors, is within the powers of the said corporation.

Sulte v. Corporation of Three Rivers.—xi. 25.

14. Licensed brewers—Quebec License Act—41 V. c. 3 (P.Q.)—Constitutionality of—43 V. c. 19 (D).

The inspector of licenses for the revenue district of Montreal charged R., a drayman in the employ of J. H. R. M. & Bros., duly licensed brewers under the Dominion Statute, 43 V. c. 19, before the court of Special Sessions of the Peace at Montreal, with having sold beer outside the business premises of J. H. R. M. & Bros., but within the said revenue district in contravention of the Quebec License Act, 1878, and its amendments, and asked a condemnation of \$95 and costs against R. for said offence. Thereupon J. H. R. M. & Bros. and R., claiming *inter alia* that being licensed brewers under the Dominion Statute, they had a right of selling beer by and through their employees and

Legislature—Continued.

draymen without a provincial license, and that 41 V. c. 3 (P.Q.), and its amendments were *ultra vires*, and if constitutional did not authorize the complaint against R., caused a writ of prohibition to be issued out of the Superior Court enjoining the Court of Special Sessions of the Peace from further proceeding with the complaint against R.

Held, *per* Ritchie, C.J., and Strong, Fournier and Henry, JJ., that the Quebec License Act and its amendments were *intra vires*, and that the court of Special Sessions of the Peace of Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the questions of fact and law involved, a writ of prohibition did not lie.

Per Taschereau and Gwynne, JJ., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition.

Per Gwynne, J.—The Quebec License Act of 1878 imposes no obligation upon brewers to take out a provincial license to enable them to sell their beer, and therefore the Court of Special Sessions of the Peace had no jurisdiction and prohibition should issue absolutely.

Molson v. Lambe.—xv. 253.

See LEGISLATURE, 10 & 13.

15. 39 V. c. 52 (P.Q.)—Constitutionality of—By-law—*Ultra vires* —Taxation of ferry boats—Jurisdiction of Harbour Commissioners—Injunction.

By 39 V. c. 52, s. 1, s-s. 3, the city of Montreal is authorized to impose an annual tax on "ferry-men or steamboat ferries;" under the authority of the said statute the corporation of the city of Montreal passed a by-law imposing an annual tax of \$200 on the proprietor or proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine mile distance from the same, and obtained from the Recorder's Court for the city of Montreal a warrant of distress to levy upon the appellant company the said tax of \$200 for each steamboat employed by them during the year as ferry-boats between Longueuil and Montreal. In an action brought by the appellant company, claiming that the provincial statute was *ultra vires* of the Provincial Legislature and that the by-law was *ultra vires* of the corporation, and asking for an injunction, it was

Held, affirming the judgment of the court of Queen's Bench, Montreal, that the Provincial legislation was *intra vires*.

2. Reversing the judgment of the court below, that the by-law was *ultra vires*, as the words used in the statute only authorize a single tax on the owner of each ferry, irrespective of the number of boats or vessels by means of which the ferry should be worked.

3. Affirming the judgment of the court below, that the jurisdiction of the harbour commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferries within such limits.

Longueuil Navigation Co. v. The City of Montreal.—xv. 566-

Legislature—Continued.**16. *New Brunswick Liquor License Act, 1887—Constitutionality of—Prohibition of sale of liquor—Granting a license—Disqualifying liquor sellers—Effect of.***

Applications for licenses under the New Brunswick Liquor License Act, 1888, must be endorsed by the certificate of one-third of the ratepayers of the district for which the license is asked. No holder of a license can be a member of the municipal council, a justice of the peace, or a teacher in the public schools.

Held, that the legislature could properly impose these conditions to the obtaining of a license, and the provision is not *ultra vires* of the local legislature as being a prohibitory measure by reason of the ratepayers being able to prevent any licenses being issued; nor is it a measure in restraint of trade by affixing a stigma to the business of selling liquor.

Danaher v. Peters, O'Regan v. Peters.—xvii. 44.

17. *Ont. Judicature Act, 1881, s. 43—Appeal to Supreme Court—Limitation of—Conditions.*

The section of the Ontario Judicature Act, 1881, s. 43, which provides that in cases where the amount in controversy is under \$1,000, no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada, except by leave of a judge of the former Court, is *ultra vires* of the Legislature of Ontario and not binding on the Supreme Court.

Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal.

Clarkson v. Ryan.—xvii. 251.

18. *By-law respecting sale of meat in private stalls—Validity of—37 V. c. 51, s. 123, s-s. 27 & 31 (P.Q.)—Power of Provincial Legislature to pass—B. N. A. Act, s-s. 9 of s. 92—"Other licenses."*

The Council of the City of Montreal is authorized by s-s. 27 & 31 of s. 123 of 37 V. c. 51, to regulate and license the sale, in any private stall or shop in the city outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold in markets.

Held, affirming the judgments of the courts below, that the s-s. in question are *intra vires* of the Provincial Legislature. Also that a by-law passed by the City Council under the authority of the above-named s-s. fixing the license to sell in a private stall at \$200 in addition to the 7½ per cent. business tax, levied upon all traders under another by-law and which the appellant had paid, is not invalid.

Fer Strong, J.—That the words "other licenses" in s-s. 9 of s. 92 of the B. N. A. Act include such a license as the Provincial Legislature have

Legislature—Continued.

empowered the City of Montreal to impose by the terms of the statute now under consideration. *Lamb v. Bank of Toronto* (12 App. Cas. 575) and *Severn v. The Queen* (2 Can. S. C. R. 70), distinguished.

Pigeon v. Recorder's Court.—xvii. 495.

19. 47 V. c. 84 (Q.), imposing a tax on wholesale liquor dealers, held *intra vires* of the Legislature of Quebec by the Superior Court and Court of Queen's Bench. No appeal on this question was taken to Supreme Court which held it had no jurisdiction to entertain the appeal on the other question raised, viz., the validity of the by-law passed in pursuance of the Act so far as it imposed a tax on compounders and bottlers of spirituous liquors, the court of Queen's Bench on this question having held the by-law invalid as not under the powers given by the statute. —xviii. 594.

See JURISDICTION, 76.

20. *Constitutional law—B. N. A. Act, ss. 91 & 92—Interest—Legislative authority over—Municipal Act—49 V. c. 52, s. 626; 50 V. c. 10, s. 43 (Man.)—Taxation—Penalty for not paying taxes—Additional rate.*

The Municipal Act of Manitoba provides that persons paying taxes before December 1st in cities and December 31st in rural municipalities shall be allowed 10 per cent. discount; that from that date until March 1st the taxes shall be payable at par; and after March 1st 10 per cent on the original amount of the tax shall be added.

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that the 10 per cent. added on March 1st is only an additional rate or tax imposed as a penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of s. 91 of the B. N. A. Act. *Ross v. Torrance*, 2 Legal News 186, overruled.

Lynch v. The Canada N. W. Land Co., South Dufferin v. Morden, Gibbins v. Barber. —xix. 204.

21. *Education—Authority to legislate with respect to—Denominational schools—53 V. c. 38 (Man.)—33 V. c. 3 (D.).*

The exclusive right to make laws with respect to education in the Province of Manitoba is assigned to the Provincial Legislature by the constitution of the province as a part of the Dominion (33 V. c. 3) with the restriction that nothing in any such law "shall prejudicially affect the rights or privileges with respect to denominational schools which any class of persons had by law or practice in

Legislature—Continued.

the province at the union." The words "or practice" are an addition to, and the only deviation from, the terms of s. 93 s.s. 1 of the B. N. A. Act, under which the New Brunswick Public School Act was upheld.

Prior to the union the Roman Catholics of Manitoba had no schools established by law, but there were schools under the control of the church for the education of Catholic children.

In 1890 the Legislature of Manitoba passed an Act relating to schools (53 V. c. 88), by which the control of all matters relating to education and schools was vested in a department of education consisting of a committee of the Executive Council and advisory boards established as provided by the Act; the schools of the province were to be free and non-sectarian and no religious exercises were to be had except as prescribed by the advisory boards: and the ratepayers of each municipality were to be indiscriminately taxed for their support.

A Catholic ratepayer moved to quash a by-law of the city of Winnipeg for collecting these school rates showing by affidavit the position of Catholic schools before the union, the practice of the church to control and regulate the education of Catholics and to have the doctrines of their church taught in the schools, and that Catholic children would not be allowed to attend the public schools.

Held, reversing the judgment of the court below, that this Act, 53 V. c. 88, by depriving Catholics of the right to have their children taught according to the rules of their church, and by compelling them to contribute to the support of schools to which they could not conscientiously send their children, prejudicially affected rights and privileges with respect to their schools which they had *by practice* in the province at the union, and was *ultra vires* of the legislature of the province. *Ex parte Renaud* [1 Pugs. (N.B.) 278] distinguished.

Barrett v. The City of Winnipeg.—xix. 374.

[On appeal to the J. C. of the Privy Council this judgment was reversed and the judgment of the Court of Q. B. of the Province of Manitoba restored. See (1892) A. C. 445; 61 L. J. 58; 67 L. T. 429.]

22. Grant of foreshore of harbour by local government—Conveyance by grantee—Claim of dower by wife of grantee—Plea that grant void—Estoppel—Act of local legislature confirming title should be pleaded—Crown not expressly named.

See ESTOPPEL, 19.

23. *Constitutional law—Administration of justice—Constitution of provincial courts—Powers of Federal Government—Appointment and payment of judges—B. N. A. Act, s. 92, s-s. 14.*

The power given to the Provincial Governments by the B. N. A. Act, s. 92, s-s. 14, to legislate regarding the constitution, maintenance, and organization

Legislature—Continued.

of Provincial courts includes the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts.

The C. S. B. C. c. 25, s. 14, enacts that "Any County Court judge appointed under this Act may act as County Court judge in any other district upon the death, illness, or unavoidable absence of, or at the request of the judge of that district, and while so acting the said first-mentioned judge shall possess all the powers and authorities of a County Court judge in the said district; provided, however, the said judge so acting out of his district shall immediately thereafter report in writing to the Provincial Secretary the fact of his so doing and the cause thereof." and by 53 V. c. 8, s. 9 (B.C.), it is enacted that "Until a County Court judge of Kootenay is appointed, the judge of the County Court of Yale shall act as and perform the duties of the County Court judge of Kootenay, and shall, while so acting, whether sitting in the County Court district of Kootenay or not, have, in respect of all actions, suits, matters, or proceedings being carried on in the County Court of Kootenay, all the powers and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters, and proceedings; and for the purpose of this Act, but not further, or otherwise, the several districts as defined by ss. 5 & 7 of the County Courts Act, over which the County Court of Yale and the County Court of Kootenay, respectively, have jurisdiction, shall be united."

Held, that these statutes were *intra vires* of the Legislature of British Columbia under the said section of the B. N. A. Act.

By the Dominion statute, 51 V. c. 47, The Speedy Trials Act, jurisdiction is given to "any judge of a County Court," among others, to try certain criminal offences.

Held, that this expression, "any judge of a County Court," in such Act means any judge having, by force of the Provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature to do so.

Held, also, that The Speedy Trials Act is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure.

Held, *per* Taschereau, J.—It is doubtful if parliament had power to pass those sections of 54 & 55 V. c. 25, which empower the Governor-General in Council to refer certain matters to the Supreme Court for an opinion.

Referred by Governor General in Council.

Re County Court Judges of British Columbia.—Dec. 13, 1892—xxi. 446.

Legislature—Continued.

- 24. Reference by Railway Committee of the Privy Council for Canada, under s. 19 of the Railway Act (51 V. c. 29, 1888)**
 —51 V. c. 5, (Man.)—*Railway Act, 1888, (D.) 306 & 307*
 —R. S. C. c. 109, s. 121.

Opinion: Under chapter 5 of the Statutes of Manitoba (passed on the thirtieth day of April, 1888,) the Railway Commissioner of that Province is constructing a railway known as the Portage extension of the Red River Valley Railway from Winnipeg to Portage la Prairie, both places being within the Province of Manitoba, and he has made application to the Railway Committee of the Privy Council of Canada under s. 173 of the Railway Act of 1888 (Canada) for the approval of the place at which and the mode by which it is proposed that the said Portage extension shall cross the Pembina Mountain branch of the Canadian Pacific Railway (the said branch being part of the Canadian Pacific Railway) at a point within the said Province, whereupon the following question is submitted:

Is the said statute of Manitoba, in view of the provision of c. 109, R. S. C. particularly s. 121 thereof, and in view of the Railway Act of 1888, particularly ss. 306 & 307, valid and effectual so as to confer authority on the Railway Commissioner in said statute of Manitoba mentioned, to construct such a railway as the said Portage extension of the Red River Valley Railway crossing the Canadian Pacific Railway, the Railway Committee first approving of the mode and place of crossing, and first giving their directions as to the matters mentioned in s. 174, 175 & 176 of the said Railway Act?

In answer to the said question, this Court having heard counsel for the Province of Manitoba and also for the Canadian Pacific Railway Company is unanimously of opinion that the said statute of Manitoba is valid and effectual so as to confer authority on the Railway Commissioner in the said statute of Manitoba mentioned, to construct such a railway as the Portage extension of the Red River Valley Railway crossing the Canadian Pacific Railway, the Railway Committee first approving of the mode and place of crossing and first giving their directions as to the matters mentioned in ss. 174, 175 & 176 of the said Railway Act.

In re Portage extension of the Red River Valley Railway.—22nd Dec. 1888.

Lessor and Lessee.

See LANDLORD AND TENANT.

LEASE.

MINES AND MINERALS.

Letters Patent.—Crown Lands—Parliamentary title—Equitable defence—38 V. c. 12, (Man.)—35 V. c. 23, (D.).

L., in 1875, applied for a homestead entry for the S. W. $\frac{1}{4}$ of s. 30, township 6, range 4 west, pre-empted by F., and paid \$10 fee to a clerk at the

Letters Patent—Continued.

office, but was subsequently informed by the officers of the Crown that his application could not be recognized, and was refunded the \$10 he had paid. F. subsequently paid for the land by a military bounty warrant in pursuance of s. 23 of 35 V. c. 23. L. entered upon the land and made improvements. In 1878, after the conflicting claims of F. and L. had been considered by the officers of the Crown, a patent for this land was granted by the Crown to F., who brought an action of ejectment against L. to recover possession of the said land. F., at the trial, put in, as proof of his title, the letters patent, and L. was allowed, against the objection of F.'s counsel, to set up an equitable defence and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The judge, who tried the case without a jury, rendered a verdict for the defendant.

Held, on appeal, reversing the judgment of the Court of Queen's Bench (Man.), that L., not being in possession under the statute, had no parliamentary title to the possession of the land, nor any title whatever that could prevail against the title of F. under the letters patent.

Per Gwynne, J.—Under the practice which prevailed in England in 1870, which practice was in force in Manitoba under 38 V. c. 12 at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment.

Farmer v. Livingstone.—v. 221.

2. *Crown Lands—Letters patent for—Setting aside—Error and improvidence—Superior title—Evidence—Res judicata—Estoppel by, as against the Crown.*

Letters patent having been issued to F. of certain lands claimed by him under The Manitoba Act (35 V. c. 3, as amended by 35 V. c. 52), and an information having been filed under R. S. C. c. 54, s. 57 at the instance of a relator claiming part of said lands to set aside said letters patent as issued in error or improvidence.

Held, 1. That a judgment avoiding letters patent upon such an information could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by *scire facias*.

2. The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters patent; and F.'s title having been recognized by the government as good and valid under the Manitoba Act and the lands granted to him in recognition of that right the letters patent could not be set aside as having been issued improvidently except upon the ground that some other person had a superior title also valid under the Act.

3. Letters patent cannot be judicially pronounced to have been issued in error or improvidently when lands have been granted upon which a trespasser,

Letters Patent—*Continued.*

having no colour of right in law, has entered and was in possession without the knowledge of the government officials upon whom rests the duty of executing and issuing the letters patent, and of investigating and passing judgment upon the claims therefor: or when such trespasser, or any person claiming under him, has not made any application for letters patent; or when such an application has been made and refused without any express determination of the officials refusing the application, or any record having been made of the application having been made or rejected.

4. *Per Patterson, J.* In the construction of the statute effect must be given to the term improvidence as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the Court to form a definite opinion as to the relative strength of opposing claims.

5. *Semle per Gwynne, J.* There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.

Fonseca v. Atty. Gen. of Canada.—xvii. 612.

Libel.—*Telegraph message—Liability of telegraph company—Special damages—Inadmissibility of evidence as to, when not alleged—Excessive damages.*

S. et al. (respondents) partners in trade, sued the D. T. Co. (appellants) for defamation of the respondents in their trade. In the declaration it was alleged: 1. That they were wholesale and retail merchants at Halifax. That appellants wrongfully, falsely and maliciously, by means of their telegraph lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated and published the false and defamatory message following:—"John Silver & Co., wholesale clothiers, of Grenville street, have failed; liabilities heavy." 2nd. That same message was caused also to be published in other parts of the Dominion. 3rd. That the appellants promised and agreed with the proprietor or publisher of the St. John "Daily Telegraph" newspaper, and entered into an arrangement with him, whereby the appellants agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages, and should publish them in his newspaper, and that in pursuance of said agreement the appellants wrongfully, maliciously, and by means of said telegraph, transmitted, sent and published from their office in Halifax to their office in St. John, and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and

Libel—Continued.

their credit and business standing and reputation were thereby greatly damaged. The D. T. Co. denied the several publications charged, and also the entering into this agreement mentioned in the third count and the forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper was corrected in the evening edition, and that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatch was not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with the respondents as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange and sometimes discounting their notes. The counsel for the defendants moved for a non-suit, which was refused, and the case was submitted to the jury, who, upon the evidence, rendered a verdict for the plaintiffs with \$7,000 damages.

On appeal to the Supreme Court of Canada, it was **Held, Taschereau and Gwynne, JJ.**, dissenting, that the appellants, the D. T. Co., were responsible for the publication of the libel in question.

Per Taschereau and Gwynne, JJ., dissenting.—Assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, and that Snyder had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded.

2. That the damages were excessive, and therefore a new trial ought to be granted. **Ritchie, C.J.**, doubting, and **Henry, J.**, dissenting.

Held, also, *per Strong, Taschereau and Gwynne, JJ.*—No special damages having been alleged in the declaration, the evidence as to such damages having been objected to, was inadmissible, and therefore a new trial should be granted.

Dominion Telegraph Company v. Silver.—x. 238.

2. On plaintiff as Commissioner of Expropriations.

See MALICIOUS PROSECUTION.

SLANDER.

3. Written—Lost MSS.—Proof of hand-writing—After-acquired knowledge—Change of signature.

See EVIDENCE, 39.

Libel—Continued.**4. Newspaper publication—Innuendoes—Trial of action—Direction to jury—Consideration of innuendoes—Withdrawal of from jury—Effect of misdirection—Excessive damages.**

W., a judge of the Supreme Court of B. C., brought an action against H., an editor, for a libel contained in the following article published in his paper:—"THE MCNAMEE-MITCHELL SUIT. In the sworn evidence of Mr. McNamee, defendant in the suit of *McKenna v. McNamee*, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership in the dry dock contract out in British Columbia, one of whom was the Premier of the Province.' The Premier of the Province at the time referred to was Hon. Mr. Walkem, now a judge of the Supreme Court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McNamee must be labouring under a mistake. Had the statement been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly, nor allowed to pass unheeded."

The innuendoes alleged by the declaration to be contained in this article were:—1. That W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money. 2. That he did so under the cloak of his public position and by fraudulently pretending that he acted in the interest of the Government. 3. That he committed criminal offences punishable by law. 4. That he continued to hold his interest in the contract after his elevation to the bench.

Held, that the article was susceptible of the first of the above innuendoes, but not of the others which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial. —

On the trial the jury found a verdict for the plaintiff, with \$2,500 damages.

Held, *per* Strong, Fournier, Taschereau and Gwynne, JJ., that the case was improperly left to the jury but the only prejudice sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to \$500.

Held, *per* Ritchie, C.J., that there had been a mistrial, and the consent of both parties to such reduction was necessary.

Higgins v. Walkem.—xvii. 225.

5. Mercantile Agency—False information—Negligence—Damages—Arts. 1053, 1054 and 1727, C. C.

Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when by culpable negligence, imprudence or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor.

Cossette v. Dun.—xviii. 222.

Libel—Continued.**6. Provisions of Act relating to newspapers—Compliance with—
Special damages—Loss of custom—50 V. cc. 22 and 23
(Man.).**

By s. 13 of 50 V. c. 22 (Man.), "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 V. c. 23, "An Act respecting Newspapers and other like Publications." By s. 1 of the latter Act no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter as the Act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published; by s. 2 such affidavit or affirmation shall set forth the real and true names, etc., of the printer or publisher of the newspaper and of all the proprietors; by s. 6 if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; and s. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking the affidavits to be used in the Court of Queen's Bench.

Held, 1. That 50 V. c. 23 contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That s. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne, J., dissenting.

3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

4. That in every proceeding under s. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

5. That if the affidavit or affirmation purports to have been taken before a commissioner his authority will be presumed until the contrary is shown.

By s. 11 of the Libel Act actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed.

Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong, J.—Where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given, or otherwise evidence of the special damage is inadmissible.

Ashdown v. Manitoba "Free Press" Company.—xx. 48.

Libel—Continued.**7. Libel in newspaper—Action for—Additional libel in plea—Damages—Excessive—Consent to reduction of verdict or new trial.**

The plaintiff by his action claimed \$10,000 damages for the publication of an article which appeared in the Toronto "Mail" on the 8th December, 1884. The defendants met the action by a plea which the plaintiff alleged contained an additional libel and he filed an incidental demand claiming a further condemnation of \$5,000 therefor.

The case was tried before Mr. Justice Johnson and a jury and resulted in a verdict in favour of the plaintiff to the extent of \$6,000 for the libel contained in the newspaper, and of \$4,000 for the additional libel contained in the defendants plea.

The Court of Review granted the motion of the plaintiff for judgment on the verdict and rejected a motion made by the defendants in arrest of judgment, for judgment *non distante veredicto* and for a new trial.

The defendants thereupon appealed to the Court of Queen's Bench for Lower Canada (appeal side) which dismissed the appeal, the majority of the Court (Dorion, C.J. and Tellier and Cross, JJ.) being of opinion that the assessment of damages was peculiarly within the province of the jury and the damages in this case were not so excessive as to lead to the inference that the jury were led into error or actuated by improper motives. Baby and Church, JJ. dissented, being of opinion that the sum of \$6,000 for the libel in the newspaper was excessive.

The case is reported in M. L. R. 4 Q. B. at p. 84, where the libels complained of and the other facts will be found set out.

On appeal to the Supreme Court of Canada it was **Held**, that upon the respondent (plaintiff) consenting to reduce the verdict to \$6,000, the appeal should stand dismissed without costs, the respondent to have his costs in the court below, and that in the event of the respondent not consenting to a reduction of the verdict there should be a new trial; the respondent to signify his election by filing a consent to that effect with the Registrar within ten days.

The respondent filed the necessary consent to a reduction of the verdict and judgment went accordingly.

Present: Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

The Mail Printing Co. v. Laflamme.—5th February, 1889.

8. Personal attack on Attorney-General—Pleading—Rejection of evidence—Fair comment—General verdict—New trial.

In an action for a libel contained in a newspaper article respecting certain legislation the innuendo alleged by the plaintiff, the Attorney-General of the Province when such legislation was enacted, was that the article charged him with personal dishonesty. Defendants pleaded "not guilty" and that the article was a fair comment on a public matter. On the trial the defendants

Libel—Continued.

put in evidence, plaintiff's counsel objecting, to prove the charge of personal dishonesty, and evidence in rebuttal was tendered by plaintiff and rejected. Certain questions were put to the jury requiring them to find whether or not the words bore the construction claimed by the innuendo or were fair comment on the subject matter of the article; the jury found generally for the defendants and in answer to the trial judge, who asked if they found that the publication bore the meaning ascribed to it by the plaintiff, the foreman said: "We did not consider that at all." On appeal for an order for a new trial.

Held, that defendants not having pleaded the truth of the charge in justification the evidence given to establish it should not have been received, but as it had been received, evidence in rebuttal was improperly rejected; the general finding for the defendants was not sufficient in view of the fact that the jury stated that they had not considered the material question, namely, the charge of personal dishonesty; for these reasons a new trial was properly granted.

Judgment of the Court of Queen's Bench for Manitoba affirmed.

The Manitoba Free Press Co. v. Martin.—18th December, 1892.—xxi. 518.

License.—*Power to impose license tax on merchants, traders, &c.—Discrimination between residents and non-residents—33 V. c. 4 (N.B.)—By-law.*

J. brought an action against G., the police magistrate of the city of St. John, for wrongfully causing the plaintiff, a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the police magistrate, for violation of a by-law made by the common council of the city of St. John, under an alleged authority conferred on that body by 33 V. c. 4, passed by the Legislature of New Brunswick. S. 3 of the Act authorized the mayor of the city of St. John to license persons to use any art, trade, &c., within the city of St. John, on payment of such sum or sums as may from time to time be fixed and determined by the common council of St. John, &c.; and s. 4 empowered the mayor, &c., by any by-law or ordinance, to fix and determine what sum or sums of money should be from time to time paid for license to use any art, trade, occupation, &c., and to declare how fees should be recoverable; and to impose penalties for any breach of the same, &c. The by-law or ordinance in question discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of \$20 on the former and \$40 on the latter.

Held, that assuming the Act, 33 V. c. 4, to be *intra vires* of the Legislature of New Brunswick, the by-law made under it was invalid, because the Act in question gave no power to the common council of St. John of discrimination between residents and non-residents, such as they had exercised in this by-law.

Jonas v. Gilbert.—v. 356.

2. To ferry.

See FERRY.

License—Continued.

3. Sale of intoxicating liquors—License law of Quebec—Omission in Statute—Tender—Costs—Mandamus.

By s. 63 of the Quebec License Law, 41 V. c. 3, it was enacted: "63. In addition to a fee of one dollar on the granting of each license, the duties comprised in the following tariff shall be payable by the applicant therefor to the license inspector, preliminary to the granting of the different licenses hereinbefore mentioned.

" Tariff of duties payable for licenses under the present law.

" On licenses for the sale of intoxicating liquors.

" 1. On each license to keep an inn and for the sale of intoxicating liquors.

" (A) In the city of Montreal, two hundred dollars, if the annual value or rent of the premises for which the license required is less than four hundred dollars, and three hundred, if the annual value or rent is four hundred dollars or more.

" (B) In the city of Quebec, one hundred and twenty-five dollars, if the annual value or rent is less than four hundred dollars, and one hundred and seventy-five dollars, if the annual value or rent is four hundred dollars or more.

" (C) In every other city eighty dollars.

" (D) In every incorporated town seventy dollars."

By s. 11 of the 42-43 V. c. 3, it was enacted as follows:

" 11. Sub-sections (a), (b) & (c) of number 1 of s. 63 of the said Act (the Quebec License Law of 1878) are repealed and replaced by the following:

" In the cities of Quebec and Montreal fifty per cent. of the rental or annual value of the premises for which such license is required: Provided that in no case shall the price of the license exceed the sum of three hundred dollars, or be less than seventy-five dollars."

No proviso for replacing class (c) repealed was yet enacted in May, 1880.

At the beginning of May, 1880, appellant went to the respondent Lassalle, who was license inspector for the district of Three Rivers, for the purpose of obtaining from him a license to keep an inn at Nos. 14 and 16 Badeaux street, in the city of Three Rivers. Appellant then and there produced the certificate approved by the corporation of the city of Three Rivers, and necessary for him to get such license. He offered at the same time the one dollar fee, according to § 1—41 V. c. 3, s. 63, and requested respondent to grant him a license, which respondent refused to do. After respondent's said refusal, appellant obtained the issuing of a writ of *mandamus* to compel respondent to grant the said license.

On the case being heard, both in the Superior Court at Three Rivers and in the Court of Queen's Bench at Quebec, the respondent urged that admitting he could not claim the sum of \$80 as originally enacted for cities other than Montreal and Quebec; and admitting he could not claim \$70 as for incorporated towns, he was at all events entitled to claim the duty of £1 16s. 0d mentioned in ss. 66 & 67 of 41 V. c. 3, which had never been repealed.

License—Continued.

These two clauses read as follows:—

"66. The Lieutenant Governor may, when and so often as he deems it expedient, by regulation reduce the rate of duty on licenses, as mentioned in Article 63 of this law, provided that this rate be not below the rate imposed by the fifth section of the Imperial Act, George III. c. 88.

"67. The duties imposed by this law on licenses of inns, restaurants, steamboats, bars, railway buffets, or liquor shops, include those imposed by said Imperial Act, but should the same be hereafter repealed, such repeal shall not have the effect of reducing the amount of such duties."

The fifth section of the 14th George III. c. 88, reads as follows:—

"5. And be it further enacted by the authority aforesaid that there shall, from and after the fifth day of April, one thousand seven hundred and seventy-five, be raised, levied, collected and paid, unto his Majesty's Receiver General of the said Province (Quebec), for the use of his Majesty, his heirs and successors a duty of one pound, sixteen shillings, sterling money of Great Britain, for every license that shall be granted by the Governor, Lieutenant-Governor, or Commander-in-Chief of the said Province to any person or persons, for keeping a house or any other place of public entertainment or for the retailing of wine, brandy, rum, or any other spiritous liquors, within the said Province; and any persons keeping any such house or place of entertainment, or retailing any such liquors, without such license, shall forfeit and pay the sum of ten pounds for every such offence, upon conviction thereof; one moiety to such person, as shall inform or prosecute for the same and the other moiety shall be paid into the hands of the Receiver General of the Province, for the use of his Majesty."

The Superior Court (Plamondon, J.), held that the offer of \$1 was sufficient and ordered the issuing of a peremptory writ of *mandamus* enjoining the respondent to grant the license asked for. This judgment the Court of Queen's Bench set aside.

On appeal to the Supreme Court of Canada, Held, that the appellant would not have been entitled to his license without offering to pay the £1 16s. 0d. stg. required by the Imperial Act in addition to the fee of \$1, even if the respondent had been authorized to issue a license, but owing to the repeal of s.s. (c) of s. 63 of 41 V. c. 3, without provision being made for the issue of licenses in other cities than Montreal and Quebec, under no circumstances could a license be issued for the city of Three Rivers for the year in question.

Per Ritchie, C.J., and Fournier, J.—The *mandamus* could not go, because the period for which the appellant claimed the license had expired, and a *mandamus* is never granted to compel a party to do an impossibility. If appellant had been entitled to his license and the time had expired after he had come to the court, it would have materially affected the question of costs, but not being entitled to his license the appeal must be dismissed with costs.

Per Henry, J.—The appellant was entitled to his license upon payment of the £1 16s. 0d. stg., together with the fee of \$1, and having been misled by the respondent into making a tender of a larger sum than the respondent was

License—Continued.

entitled to demand, and not of the exact sum as required by the law, the respondent ought to pay the costs.

Appeal dismissed with costs.

S-s. (c) of s. 63 of 41 V. c. 3, has been re-enacted by 56 V. c. 5, s. 3 (Q.)

Bergeron v. Lassalle.—29th March, 1882.

4. Liquor License Act, 1883, and Act amending, *ultra vires* of Parliament of Canada.

See LIQUOR LICENSE ACT, 1883.

5. Quebec License Act (41 V. c. 3) *intra vires* of Legislature of the Province.

See LEGISLATURE, 13.

6. *By-law imposing license on Transient Merchants and Traders—Validity of, under 29 & 30 V. c. 57, s. 20, 21 (Q.)—Commercial Traveller—Arrest of, for selling without license—Action for illegal arrest—Evidence—Damages—Amendment of pleadings by Supreme Court of Canada—Supreme Ct. Am. Act, 1879.*

On the 12th of October, 1866, under the statute 29-30 V. c. 57, s. 20, the corporation of the City of Quebec passed the following by-law:—

1. "That no person shall hereafter follow the occupation of a transient merchant or trader, or agent, clerk, or employee of a transient merchant or trader, in the City of Quebec, or shall sell in the said city by samples, without having previously taken out from the clerk of the said city a license for which there shall be paid to the treasurer of the said city the sum of sixty dollars; the said license shall not be valid for any longer period than one year from the date thereof.

2. "That any person contravening the present by-law shall, on conviction before the Recorder's Court, pay a fine not exceeding two hundred dollars, and in default of immediate payment of the said fine and of the costs, shall be imprisoned and detained in the common gaol of the district of Quebec, for a period not exceeding two months, unless the said fine and costs, together with those of imprisonment, be sooner paid."

The plaintiff, a commercial traveller for a firm in Montreal, was in a store in Quebec, writing down an order for his firm, and had a small screw in his hand as a sample when he was arrested by a policeman, and brought to the station. He subsequently paid the license, and brought an action against the corporation, complaining of the false and illegal arrest and imprisonment. The corporation by their plea justified the arrest upon the ground that P. had openly committed a breach of the by-laws and municipal regulations in force, by selling by sample, and without having first obtained a license.

License—Continued.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), Henry, J., dissenting, that the plaintiff's acts were of such a nature that there was probable cause under the statute and by-law for the arrest, which, therefore, was not a tort by the corporation.

Per Strong and Fournier, JJ.—The evidence fell short of establishing the allegation of the defendant's plea that the plaintiff was actually engaged in selling, there being no proof of any actual sale, but did show that he was openly pursuing the occupation of a transient merchant or trader, or employee of a transient merchant or trader, without license, and the court would permit of an amendment of the pleadings, which would adapt the allegations of the parties to the case as disclosed by the evidence. (*See* 11 Q. L. R. 249).

Appeal dismissed with costs.

Piche v. The City of Quebec.—22nd June, 1885.

7. *Municipal by-law—Sale of Meat—Quantity—Time and place.*

Section 508, s.s. 5 of the Municipal Act of 1883 empowers the council of a municipality to regulate the place and manner of selling meat, subject to the restrictions in the five next preceding sections. S. 497 authorizes the sale after certain hours at places other than the market of any commodity which has been offered for sale in the market.

Held, affirming the judgment of the Court of Appeal for Ontario, Strong and Taschereau, JJ., dissenting, that by-law No. 629 of the city of Ottawa requiring everybody offering fresh meat for sale in the city to take out a license, and providing that no meat should be sold in any place except the stalls of the different city markets, was a valid by-law and within the power of the city council to pass.

Held, *per* Strong and Taschereau, JJ., that those portions of the by-law fixing the places at which fresh meat should be sold and prohibiting its sale elsewhere, are *ultra vires* of the city council under the said sections of the Municipal Act, 1883.

The Ontario Act 50 V. c. 29, s. 29 passed since this decision has now settled the law on this subject.

O'Meara v. The City of Ottawa.—March 15th, 1888.—xiv. 742.

8. *To brewer—Quebec License Act—41 V. c. 3 (P.Q.)—Constitutionality of—43 V. c. 19 (D.).*

See LEGISLATURE, 14.

9. *For sale of liquor—New Brunswick Liquor License Act, 1887—Powers of Mayor of city under directory provisions—Effect of disqualifying liquor sellers.*

See STATUTE, 8.

LEGISLATURE, 16.

License—Continued.

10. By-law respecting sale of meat in private stalls—Validity of—37 V. c. 51, s. 123, s-s. 27 & 31 (P.Q.)—Power of Provincial Legislature to pass—B. N. A. Act 1867, s-s. 9 of s. 92—"Other licenses."

See LEGISLATURE, 18.

11. To use land—Adjoining lands—Way of necessity—Construction of agreement.

See EASEMENT, 6.

12. To cut timber—Action by locatee against licensee—Location tickets—Transfer of purchaser's rights—Registration of—Waiver by Crown of non-performance of settlement duties—23 V. c. 2, ss. 18 & 20 (Q.)—32 V. c. 11 s. 13 (Q.)—36 V. c. 8 (Q.).

See CROWN LANDS.

13. Crown Lands (Ont.)—Free grants—License to cut timber—Patent—Rights of patentee.

See CROWN LANDS, 2.

14. Timber limits—Description—Plan furnished by Crown—Misunderstanding—Remedy for loss—R. S. Q., Art. 5976.

See CROWN, 28.

Licitation—Sale by—Binding on parties—Act of incorporation of company—Vendor to company estopped from questioning validity of.

See SALE OF LAND, 26.

Lien—*Detinue, action of.*

W. left with C. a chronometer for the purpose of its being repaired. C., after taking chronometer to pieces, found detent spring much rusted, and sent it to Boston to have it made right. W. offered C. 25.50 for his work, but C. said he would not deliver the chronometer until full charges were paid, viz., \$47. W. thereupon sued C. to recover possession and use of his chronometer. The evidence of the making of the contract was conflicting, and the learned judge at the trial charged the jury, as a matter of law, that even if defendant's version were correct as to the orders given him by plaintiff in reference to putting the instrument in order, plaintiff was entitled to recover, because such order or instructions would give no authority to send the instrument to a

Lien—Continued.

foreign country to have any portion of the work done; and that, if it was so sent, no lien would exist in defendant's favor for the value of the work without special instructions or plaintiff's consent; that no such order or consent was shown in the evidence, and that consequently no lien existed. The jury, however, found a verdict for defendant, stating, at the delivery of it, that they had adopted the defendant's statement as to the authority and instructions that he had received from the plaintiff in regard to the instrument when it was left with the defendant.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the rule nisi for a new trial should be discharged, and, as no fault was found with the work done, the respondent had a lien until he was paid his charges.

Webber v. Cogswell.—ii. 15.

2. *Lien for advances to get out timber under agreement—Right to enforce as against another creditor, and to demand an account.*

In January, 1876, the defendant (Bew) and plaintiffs (Shortreed & Co.) entered into a written agreement with themselves and with one Joseph Gordon, a lumberer who was then engaged in manufacturing, under a contract with Messrs. Allan Gilmour & Co., waney white pine timber, in the Muskoka district, in Ontario, and to whom the defendant (Bew) had already made advances to the extent of nearly \$4,000 for that purpose. Under this agreement the defendant was to complete his advance to \$4,000; and to enable Gordon to go on with his lumbering operations in Muskoka, the plaintiffs undertook to advance him, on his own drafts, drawn on the defendant, the sum of \$7,000, "or so much as with the said \$4,000 would put the said timber on the track of one of the said railway lines (the Northern Railway or its extension) free of all claims." The defendant was then to furnish money to convey the timber so got out to Quebec. The plaintiffs were to have a first lien for their advances, commission and interest. Subject to this lien the defendant was to have the sale of the timber and was to repay himself his advances out of the proceeds, and the balance, if any, was to be paid over to Mr. Dalton McCarthy.

The declaration alleged, that in pursuance of the said agreement the plaintiffs made advances to Gordon to the extent of \$23,881.83; that Gordon manufactured a large quantity of timber, which was conveyed to Quebec; that a part of it was sold from which the plaintiffs received \$18,800, leaving a balance of \$8,000, including interest and commission due to them; that the remainder of the timber, of the value of more than \$8,000, and upon which the plaintiffs had a lien, as aforesaid, and which was amply sufficient to pay the claim of the plaintiffs, was taken possession of by the defendant and appropriated to his own use; and the plaintiffs, in consequence, prayed that the defendant should be condemned to pay the balance so due to them on their said advances.

Lien—Continued.

The defendant by his plea set forth the special circumstances under which the agreement in question was entered into, and averred, among other things, that he advanced to Gordon \$4,000 to enable him to manufacture the timber in question; that he advanced him a further sum of \$3,500 to enable Gordon to convey it from the Northern Railway to Quebec; that plaintiffs had no right to make any advances on the timber except for the purpose "of manufacturing it and getting it out, and placing it on the railroad."

The defendant wholly denied that the plaintiffs made advances to the extent of \$23,000, and alleged that the sum of \$18,000, which the plaintiffs admitted they received, was much more than sufficient to pay what was really due to the plaintiffs. The defendant also alleged that the plaintiffs, under the agreement, had no right to advance more than the sum of \$7,000, provided for in the agreement, and that the portion of the timber which came into his possession was unsaleable and unmerchantable; that it was placed in his hands by Messrs. Gilmour & Co., and Messrs. Burstall & Co., at the request of the plaintiffs.

The last allegation in the plea was that the plaintiffs and Gordon owed him, the defendant, for the causes mentioned in the plea, \$8,000, and that he had a right to apply the proceeds of the merchantable timber so placed in his hands for the payment of his said claim.

The plaintiffs' declaration therefore set forth two distinct grounds of action.

The first, that there was a balance of \$8,000 due to the plaintiffs upon the whole of their advances, and that for that amount they had a right to look to the defendant.

The second, that the defendant had appropriated to his own use timber of the value of \$8,000, upon which the plaintiffs, under the said agreement, had a first lien for the said sum of \$8,000, and that the defendant was therefore bound to pay to the plaintiffs the said sum of \$8,000, of which they had been so deprived by the defendant.

The action was tried at Quebec, before Meredith, C.J., who found (1) that the plaintiffs had established their making advances to Gordon to the extent alleged, viz., \$23,881.83, for the making and manufacturing of the timber mentioned in the declaration, and for its conveyance to Quebec, for the repayment of which sum out of proceeds they had a first lien. (2) That after the timber reached Quebec, a part thereof was sold by the plaintiffs to Messrs. Burstall and Gilmour, as alleged in their declaration, that they received from the sale so made \$18,800 currency, and that there remained a balance of \$900 in the hands of Messrs. Allan Gilmour & Co., as being part of the price of the timber so sold them by the plaintiff. (3) That thus, when the action was brought, there was a balance of \$4,161 due the plaintiffs on account of their said advances. (4) That of the timber brought down the defendant received and converted to his own use timber of the value of \$4,322.93. (5) That for the value of this timber the defendant was accountable to the plaintiffs under the agreement, there being no personal liability whatever from him to them for the advances. (6) That the defendant was entitled to deduct from this sum \$2,309.92, money laid out by him for the plaintiffs' benefit, and

Lien—Continued.

that for the balance, \$2,012, the plaintiffs were entitled to judgment. (7) Further, the learned Chief Justice, while admitting that the conventional lien, to which the defendant was a party, was limited to the advances made by the plaintiffs towards the manufacturing of the said timber and its delivery on the track of the Northern Railway and the Northern Extension Railway, held that they had a common law lien for their expenditure in bringing the timber to Quebec; and on this ground, no attempt having been made to show what part of the advance went for one object and what part for the other, considered them entitled to priority over the defendant's expenditure for the whole of their own.

This judgment was confirmed by the Court of Queen's Bench for Lower Canada.

On appeal to the Supreme Court of Canada the defendant contended:—

1. That it was proved the plaintiffs had retained a portion of the timber for which they had not accounted; 2. That contrary to the agreement the advances had not been made on drafts drawn on defendant, who was therefore prevented from establishing and controlling the amount of advances; 3. That a sum of \$3,500 had been sent by defendant to Gordon to pay railway freight, and this sum should have been credited to defendant, although it appeared that Gordon did not account for it and the plaintiffs were not aware of its having been advanced; 4. That the plaintiffs' alleged advances were not established by the evidence.

Held, Ritchie, C.J., and Henry, J., dissenting, that the appeal must be allowed.

Per Strong, J.—The advances not having been made in manner prescribed, on Gordon's bills drawn on defendant, and the defendant being thus deprived of the power to control the amount of advances, and there being no proof that the defendant ever acquiesced in a departure from the mode of making the advances prescribed by the agreement, or waived his strict rights under it, the plaintiffs were not entitled to the prior lien which the agreement provided for in case the money to be furnished by them was advanced according to the terms of the agreement. The defendant had therefore a right to retain an amount out of the proceeds of the timber equivalent at least to his advance of \$4,000.

Per Strong, Fournier and Gwynne, JJ.—The defendant was also entitled to the \$3,500 advanced to Gordon for the purpose of paying the railway charges, Gordon being the proper person to be entrusted with the funds, and no negligence being imputable to the defendant, who advanced the money to carry out his agreement. Further, the plaintiff's action ought to be dismissed on the ground that they had failed to account for the timber which came to their hands, or to prove the advances which they claimed to have made.

Appeal allowed with costs.

Bew. v. Shortreed.—23rd June, 1884.

3. Under Mechanics' Lien Act, as against prior mortgagee.

See MECHANICS' LIEN.

Lien—Continued.

4. By bank on shares of insolvent.

See BANKS AND BANKING, 12.

5. Written agreement to cut wood—Collateral parol agreement as to holding wood as security till paid for—Security.

See AGREEMENT, 16.

6. Of execution creditor for costs under R. S. O. 1887, c. 124, s. 9.

See ASSIGNMENT, 13.

7. *Assessment and taxes—46 V. c. 28 (N.S.)—Priority over mortgage made before statute—Construction of Act.*

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon except as against the crown. Held, affirming the judgment of the court below, that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed.

O'Brien v. Cogswell.—xvii. 420.

8. Insolvent Bank—Bank Act, R. S. C. c. 120, s. 79—Priority of note holders—Prerogative of Crown.

See CROWN, 21.

9. Of unpaid vendor—Sale of goods—Non-delivery—Part of large parcel.

See SALE OF GOODS, 21.

10. Mechanics Lien—Materials supplied to contractor—Payment by promissory note—Suspension of lien—Waiver.

See MECHANIC'S LIEN, 2.

11. Pledge of railway property for disbursement—Agreement as to —Void as against creditors—opposition *à fin de charge*. Arts. 419, 1977, 2015 and 2094, C. C.

See PLEDGE, 5.

Life Rent—Transfer of arrears of.

See COMMUNITY.

Light and Air.

See EASEMENT, 3.

Limitations—Action on bond given as collateral security to mortgage—Cons. Stats. N. B. c. 85, ss. 1 & 6—3 & 4 Wm. IV. c. 42.

See MORTGAGE, 2.

2. *Trespass—Plea of liberum tenementum—Possession, title by.*

In an action of trespass *quare clausum fregit* for the purpose of trying the title to certain land adjoining the city of Belleville, the defendants pleaded not guilty; and 2nd. That at the time of the alleged trespass the said land was the freehold of the defendants, M. E. McC. and J. L. McC., and they justified breaking and entering the said close in their own right, and the other defendants as their servants, and by their command. The case was tried by Armour J., without a jury, and he rendered a verdict for plaintiff with thirty dollars damages. The judgment was set aside by the Court of Common Pleas, and they entered a verdict for the defendants in pursuance of R. S. O. c. 50, s. 287. On appeal, the Court of Appeal for Ontario reversed this judgment and restored the verdict as originally found by Armour, J. The defendants thereupon appealed to the Supreme Court.

Held, that the appellants (defendants) on whom the onus lay of proving their plea of *liberum tenementum*, had not proved a valid documentary title, or possession for twenty years of that actual, continuous and visible character necessary to give them a title under the Statute of Limitations; therefore plaintiff was entitled to his verdict. Henry, J., dissenting.

McConaghy v. Denmark.—iv. 609.

3. Possession by tenant at will.

See TENANCY AT WILL.

4. Statute of—May be pleaded by the Crown.

See PETITION OF RIGHT, 7.

5. As against interest on taking accounts.

See PAYMENT, 5.

PREScription.

6. Action of trespass—Title by possession.

See TRESPASS, 9.

7. In suit to redeem by heirs of mortgagee—Purchase under decree for sale by mortgagee — Trustee for sale — R. S. O. c. 108 s. 19.

See MORTGAGE, 16.

Limitations—Continued.

8. Title by possession acquired under Statute of Limitations, 38 V. c. 160.

See POSSESSION, 7.

9. *Statute of Limitations—Trespass on wild lands—Isolated acts of—Title—Misdirection.*

Isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the Statute of Limitations, and there was no misdirection in the judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute.

To acquire such a title there must be open, visible and continuous possession known or which might have been known to the owner, not a possession equivocal, occasional, or for a special or temporary purpose. *Doe d. Des-Barres v. White*, 1 Kerr, N.B., 595 approved.

The judgment of the court below affirmed, Gwynne, J., dissenting on the ground that the finding of the jury on the question submitted to them was against evidence, and further that the acts done by the defendant were not mere isolated acts of trespass, but acts done in assertion of ownership during a period exceeding thirty-five years, and the evidence of such acts should have been submitted to the jury and the jury told that if they believed this evidence they should find for the defendant.

Sherren v. Pearson.—xiv. 581.

10. *Statute of Limitations—Petition of Right—Defence by Crown—Petition of Right Act, 1876, s. 7—Construction of.*

In 1886, M. sought to recover from the Crown lands set out for the construction of the Rideau Canal by virtue of 8 Geo. IV. c. 1, but not actually used therefor, and an indemnity for such portion thereof as had been sold by the Crown. By section 7 of the Petition of Right Act, 1876, the Crown is allowed to set up any defence to a petition of right that would be available to the defendant in a suit between subject and subject. By the Ordinance Vesting Act, 7 V. c. 11, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordinance in Great Britain, and by section 29 it was enacted: "Provided always and be it enacted that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the use of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

Held, per Ritchie, C.J., Strong and Gwynne, JJ.—The suppliant is debarred from recovering by the Statute of Limitations, which the Crown has a right to set up in defence under the 7th section of the Petition of Right Act of 1876.

Per Strong, J.—Independently of this section, the Crown, having acquired the lands from persons in favour of whom the statute had begun to run before the possession was transferred to the Crown, the body incorporated under the

Limitations—Continued.

title of "The Principal Officers of Ordnance" would be entitled to the benefit of the statute, which would continue to run in favour of the Crown.

Per Fournier, Henry and Taschereau, JJ.—The Crown was not entitled to set up the Statute of Limitations as a defence by virtue of section 7 of the Petition of Right Act, 1876, that section not having any retroactive effect.

McQueen v. The Queen.—xvi. 1.

11. Railway—Damages caused by sparks from locomotive—Limitation of actions for damages—R. S. C. c. 109, s. 27—51 V. c. 29, s. 287.

See RAILWAYS AND RAILWAY COMPANIES, 53.

12. *Statute of Limitations—Acknowledgment of debt barred by—Sufficiency of—Assignment of chose in action—Right of assignee to sue—Notice to debtor—R. S. (N. S.), 4 ser. c. 94, ss. 355 & 359.*

The following letters written by a debtor to his creditor were held to take the debt out of the operation of the Statute of Limitations:

HOPEWELL, August 9th, 1876.

DEAR UNCLE FINLAY,—I received a letter from you some time ago about your money. I delayed writing because I did not know what to write. I did not know but something would turn up that would enable me to pay you. I have a good deal of property—too much for these hard times—and I want to sell some of it, but cannot in the meantime, as times are that bad that people do not want to buy anything, only what they cannot do without. But this state of matters will not continue long, and when the times get better I will make some arrangement to pay you your money. Be not afraid of it, as I have but a small family and no boys, I will have plenty to pay my debts. I did get somewhat behind hand by railway affairs, but have recovered, and I am now in possession of a good deal of property and in a fair way of doing well whenever the times get better. I regret very much keeping it from you so long; however, I hope the time will soon come when I will be able to pay you.

Yours very truly,
ALEX. McDONALD.

HOPEWELL, June 19th, 1875.

DEAR UNCLE,—I am in receipt of yours of the 31st of May about your money, and must say I am not astonished at you for wanting it. You ought to have had it long ago, and you would have had it, only I was unfortunate in a railroad contract I took, on the railroad between Truro and Pictou, in which I lost considerable money, and got largely in debt besides. After giving up the work I hired with the Government to carry on part of the work. At this time James and I commenced to build a cloth factory on a small scale, in order to have some permanent work. I borrowed most of what I put in. The man

Limitations—Continued.

who had your money on mortgage, after having it two years, left. I had to sell the property, which I took from him by deed, for one thousand dollars, losing by this likewise. I then got an offer from the Government to go to the Red River and North-west Territory to explore there for two years among the Indians, and got back last winter. I have now my debt nearly paid and the amount of your claim secure in property, viz., land property, so that you will be as sure of your money in a short time as if you had it. Do not think, Finlay, that I intend to do you, or any other body, out of one shilling. So rest assured that I have your money secured in a manner that you will get it, although I cannot send it now. You had good patience, so I hope you will have a little more, and I will put you all right.

I believe I worked as hard and travelled far more than you did, and have been much more unfortunate than you were since you left; but since two years I have done well, and hope soon to do well by you. Now, Finlay, rest assured that I have your money secured so that you will get it, whatever becomes of me.

Mr. F. THOMPSON,
Port Ludlow, British Columbia.

Very truly yours,
ALEX. McDONALD.

The Revised Statutes of Nova Scotia, 4 ser. c. 94, s. 355, authorizes the assignee of a chose in action in certain cases to sue thereon in the Supreme Court as his assignor might have done, and s. 357 provides that before such action is brought a notice in writing, signed by the assignee, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall be served on the party to be sued. Pursuant to this section the assignee of a debt served the following notice:—

PICTOU, Nov. 21st, 1878.

ALEX. GRANT, Esq.:

Admr. Estate of Alexander McDonald, deceased.

DEAR SIR,—You are hereby notified in accordance with c. 94 of the Revised Statutes, s. 357, that the debt due by the above estate to Finlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of twelve hundred dollars, the amount of the said debt so assigned to him.

S. H. HOLMES,
Att'y. of ALEX. D. CAMERON.

Held, affirming the judgment of the court below, that the notice was a sufficient compliance with the statute.

PRESENT:—Sir W. J. Ritchie, C.J. and Strong, Fournier, Taschereau, and Patterson, JJ.

Grant v. Cameron.—May 6, 1891.—xviii. 716.

13. Statute of—Title to land—Possession—Nature of—Evidence.

In an action against O. to recover possession of land it was shown that O. had been in possession over twenty years; that he was originally in as a caretaker for one of the owners; that afterwards the property was severed by judicial decree and such owner was ordered to convey certain portions to the others; that after the severance O. performed acts showing that he was still

Limitations—Continued.

acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways.

Held, reversing the judgment of the Court of Appeal and restoring that of Rose, J., at the trial, that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker and he had acquired no title by possession. *Ryan v. Ryan*, 5 Can. S. C. R. 497, followed.

Heward v. O'Donohoe.—xix. 341.

14. Administration proceedings—Proving claim on notes held under agreement with original holder thereof to divide proceeds—Champerty—Subsequent proof by original holder.—Right to come in under administration order—Statute of Limitations no bar to so doing.

See CHAMPERTY.

15. Devise of land without estate therein—Possession—Right to set up statute.

See TITLE, 7.

16. Sale of lands by Sheriff under execution on judgment against executor for note given by him and endorsed by testator—Purchase by executor—Possession taken by devisee—Trust.

See TRUSTS AND TRUSTEES, 24.

17. Will—Devise to children—Possession of lands of estate taken by one son, an executor and trustee but who had not proved with consent of acting executor and trustee—Statute of Limitations.

See WILL, 23.

Liquidator—

See WINDING UP.

Liquor—Sale of.

See LEGISLATURE, 10.

2. Conviction for having liquors near public work—Destruction of liquors—Malicious arrest and imprisonment by justice of the peace.

See MALICIOUS ARREST.

Liquor License.—Liquor License Act, (N.B.)—50 V. c. 4 (N.B.)—
Validity of—Prohibition of sale of liquor—Powers of mayor
of city—Disqualifying liquor sellers—Effect of.

See STATUTE, 8.

LICENSE, 8.

LEGISLATURE, 18, 16.

Liquor License Act, 1883.—*Amending Act*—47 V. c. 32, s. 26—
Reference by Governor in Council—Act ultra vires of
Dominion Parliament,

Case referred by the Governor General in Council under s. 26 of 47 V.
c. 32, "An Act to amend the Liquor License Act, 1883."

1st Question.—Are the following Acts, in whole or in part, within the
legislative authority of the parliament of Canada, namely:—

(1.) The Liquor License Act, 1883?

(2.) An Act to amend the Liquor License Act, 1883.

2nd Question.—If the court is of opinion that a part or parts only of the
said Acts are within the legislative authority of the parliament of Canada,
what part or parts of said Acts are so within such legislative authority?

Opinion.—The Acts referred to are, and each of them is, *ultra vires* of the
legislative authority of the parliament of Canada, except in so far as the said
Acts respectively purport to legislate respecting those licenses mentioned in
s. 7 of the said "The Liquor License Act, 1883," which are there denominated
Vessel Licenses and Wholesale Licenses, and except also, in so far as the said
Acts respectively relate to the carrying into effect of the provisions of "The
Canada Temperance Act, 1878." The Hon. Mr. Justice Henry, being of
opinion that the said Acts are *ultra vires* in whole.

[On appeal to the Privy Council, the Acts were held *ultra vires* in whole.]

In re The Liquor License Act, 1883.—12th January, 1885.

2. *Salaries of License Inspectors—Approval by Governor General
in Council—Liquor License Act, 1883, s. 6.*

On a claim brought by the Board of License Commissioners appointed
under the Liquor License Act, 1883, for moneys paid out by them to license
inspectors with the approval of the Department of Inland Revenue, but which
were found to be afterwards in excess of the salaries which two years later
were fixed by Order in Council under s. 6 of the said Liquor License Act, 1883.

Held, *per* Fournier, Taschereau and Patterson, J.J., affirming the judgment
of the Exchequer Court, that the Crown could not be held liable for any sum
in excess of the salary fixed and approved of by the Governor General in
Council.

Per Ritchie, C.J., and Strong, J., that the Act under which the appellant
was appointed having been declared *ultra vires* the petition of right was not
maintainable. The Liquor License Act, 1883, s. 6.

Burroughs v. The Queen.—xx. 420.

Litigious Rights.—*Sale of*—*Arts. 1582, 1583, 1584, s. 4, C. C. (P. Q.)*.

B. became holder of 40 shares upon transfers from D. *et al.*, in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non-payment of dues. Subsequently by a Superior Court judgment rendered in a suit of one C., other shares, which had been confiscated for similar reasons, were declared to be valid and to have been illegally forfeited. Thereupon B. by a petition for writ of *mandamus* asked that he be recognized as a member of the society and be paid the amount of dividends already declared in favour of and paid to other shareholders. B.'s action was met, amongst other pleas, by one setting forth that B. had acquired under the transfers in question litigious rights and that, by law, he was only entitled to recover from the respondents the amount he had actually paid for the same, together with legal interest thereon, and his cost of transfers.

Held, affirming the judgment of the court below, Fournier and Henry, JJ., dissenting, that at the time of the purchase of said shares, B. was a buyer of litigious rights within the provisions of Art. 1583, C. C., and under Art. 1582 could only recover from the liquidators the price paid by him with interest thereon.

Also, that the exception in Art. 1584, § 4 of C. C. only applies to the particular demand in litigation which has been confirmed by a judgment of a court, or which having been made clear by evidence is ready for judgment.

Brady v. Stewart.—xv. 82.

2. Judgment in favour of crown for possession of land—Sale to advocate—Tierce opposition to judgment by proprietor—Intervention—*Arts. 1485 & 1583, C. C.*

See PRACTICE, 14.

Loan.—By trader to non-trader—Interest—Prescription—C. C. L. C. Art. 2250.

See PRESCRIPTION, 1.

Loss.—Constructive—Total.

See INSURANCE, MARINE, 2, 5, 6, 9, 15, 16, 19, 20, 27, 30.

M.

Magistrate.—

See JUSTICE OF THE PEACE.

Maintenance.—

See DEED, 10.

Malicious Arrest.—*Malicious and illegal arrest and imprisonment—Justice of the Peace—Conviction for having liquors near public works—Destruction of liquors—Notice of action, sufficiency of—*

An action brought to recover damages for the malicious and illegal arrest and imprisonment of the plaintiff, and for the destruction of a quantity of liquor belonging to him. The facts of the case are fully set out in 15 O. R. 716. The defendants appealed from the judgment of the Divisional Court to the Court of Appeal for Ontario, which latter court affirmed the judgment of the Divisional Court and dismissed the appeal.

On appeal to the Supreme Court of Canada, that court **Held** that the judgment of the court below should be affirmed and the appeal dismissed with costs.

Present.—Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Conmee v. Bond.—20th March, 1890.

Malicious Proceedings—Obtaining injunction maliciously.

See DAMAGES, 19.

2. In insolvency.

See DAMAGES, 25.

INSOLVENCY, 9.

Malicious Prosecution—*Action for libel—Slander—Prescription, Arts. 2262 and 2267, C.C.—Proceedings instituted to remove plaintiff from position of commissioner of expropriations.*

This action was instituted by James K. Springle, in his life time civil engineer, for \$20,000 for damages which he alleged he had suffered in consequence of his having been unjustly removed by the defendants (the mayor, etc., of the city of Montreal,) from the position of commissioner of expropriations for the widening of St. Joseph street, in the city of Montreal. The appellants, widow and daughters of the late James K. Springle, became plaintiffs *par reprise d'instance*.

On the 14th April, 1868, Springle and two others, Brown and Masson, were named joint commissioners to determine the amount which should

Malicious Prosecution—Continued.

be accorded to the Hon. C. Wilson for the expropriation of a part of his property.

Messrs. Springle and Brown, after valuing the compensation which should be given to Mr. Wilson at \$19,500, on certain objections being made, reduced the amount in their final report to \$18,666. Mr. Masson, not agreeing with his colleagues, in his report declared that \$7,500 would be a sufficient compensation.

Thereupon, on the 7th August, 1868, the defendants passed a resolution charging Springle and Brown with fraud and partiality, and an application was made to the Superior Court to have them removed from the office of commissioners.

On the 17th September, 1870, the application was granted on the ground that the commissioners had committed an error of judgment in the execution of their duty as commissioners, and had proceeded on a wrong principle in estimating the amount payable for expropriation. The charges of fraud and partiality were held unfounded.

On the 20th September, 1873, the Court of Queen's Bench for Lower Canada re-instated the said Springle and Brown in their position as commissioners.

On the 4th November, 1876, this judgment was confirmed by the Privy Council. Their Lordships say:—

"The petitions contained charges of very scandalous fraud and partiality.

"Their Lordships think it unfortunate that such charges were made, because it turned out there was no ground whatever for them. The respondents were removed, not for having carried into effect a right principle erroneously, but for having adopted an erroneous principle. Their Lordships consider that the principle adopted by the respondents was not erroneous, and therefore that the inference of want of diligence drawn from it fails."

In the meantime, in May, 1871, Springle had brought the present action of damages against the defendants—and this action was prosecuted, on his death, by the present respondents.

At the hearing on the merits, the present appellants urged three points and they submitted:

1st. That the action was absolutely barred under Arts. 2262 & 2267 of the Civil Code of Lower Canada, which read respectively as follows, Art. 2262: "The following actions are prescribed by one year: 1. For slander or libel, reckoning from the day that it came to the knowledge of the party aggrieved."

Art. 2267. "In all the cases mentioned in Arts. 2250, 2260, 2261 & 2262, the debt is absolutely extinguished, and no action can be maintained after the delay for prescription has expired."

2nd. That the appellants had not been actuated by malice, that they had considered it a duty to adopt proceedings for the redress of grievances complained of by the interested parties, that there was reasonable and probable

Malicious Prosecution—Continued.

cause for their acts, and that Springle had suffered no damage for which they were amenable to law.

The Superior Court, relying on the provisions of the code, dismissed the action on the 31st May, 1880, without entering into the merits, but the Court of Appeals, on the 27th January, 1883, reversed the judgment and allowed \$3,000.00 damages to the present respondents, being of opinion that, as the matter was still in course of litigation, Arts. 2262 & 2267, C. C. did not apply, and the action was not prescribed; that there was no proof of the fraud and misconduct; that the proceedings were without reasonable and probable cause, and malice should be inferred.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Queen's Bench, Fournier, J., dissenting, that the action was not an action merely for the libel contained in the resolution of the 7th August, 1868, but for a malicious prosecution, following up that resolution by proceedings instituted in the courts, maliciously and without any reasonable and just cause, and prescription did not begin to run until the termination of such proceedings. The action, therefore, and judgment for damages should be sustained, no objection having been raised that the action was prematurely brought.

Montreal v. Hall.—xii. 74.

2. Action for malicious prosecution—Favourable termination of.

Where a party pays under protest a penalty imposed upon him by a justice of the peace in proceedings taken against him under the provisions of c. 22 of the Consolidated Statutes of Lower Canada, "An Act respecting Good Order in and near Places of Public Worship," and such party afterwards brings an action in damages against the person, whom he alleged had maliciously instigated such proceedings, and at the trial before a jury there is no evidence of the favourable termination of the prosecution against him, the court were equally divided as to the right of such party to maintain his action.

Sir W. J. Ritchie, C.J. and Strong and Taschereau, JJ., were of opinion that the action could not be maintained under such circumstances. Fournier Henry and Gwynne, JJ., *contra*. The appeal was in consequence dismissed without costs.

Poitras v. Lebeau.—March 15, 1888—xiv. 742.

3. Injunction—41 V. c. 14, s. 4, (P.Q.)—Action for Damages—Want of probable cause—Damages other than costs.

Where a registered shareholder of a company, finding the annual reports of the company misleading, applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ; and consequently, the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction.

The Montreal Street Railway Company v. Ritchie.—xvi. 622.

Malicious Prosecution—Continued.**4. Action for malicious prosecution—Reasonable and probable cause—Inference from facts proved—Functions of judge and jury.**

In an action for malicious prosecution, the existence or non-existence of reasonable and probable cause is to be decided by the judge and not the jury.

A., staff-inspector of the Toronto police force, laid an information before the police magistrate charging M., a married woman, with the offence of keeping a house of ill-fame. In laying the information, A. acted on a statement made to him by a woman who alleged that she had been a frequenter of the house occupied by M., and stated facts sufficient, if true, to prove the charge. A warrant was issued against M., who was arrested and brought before the magistrate, who, after hearing the evidence, dismissed the charge. M. and her husband then brought an action against A. for malicious prosecution.

The action was tried three times, each trial resulting in a judgment of non-suit, which was set aside by a Divisional Court and a new trial ordered. From the judgment ordering the third new trial A. appealed, and the judges in the Court of Appeal for Ontario being equally divided the order for new trial stood. A. then appealed to the Supreme Court of Canada.

At the last trial of the action it was shown that A. had requested the police inspector for the division in which M.'s house was situate to make inquiries about it, and that after the information was laid the inspector informed A. that there were frequent rows in the house owing to the intemperance of M., and that he thought there was nothing in the charge. The trial judge did not submit the case to the jury, but held that want of reasonable and probable cause was not shown; but the Divisional Court held that he should have asked the jury to find on the fact of A.'s belief in the statement furnished to him, on which he acted in bringing the charge.

Held, Taschereau, J., dissenting, that A. was justified in acting on the statement, and, the facts not being in dispute, there was nothing to leave to the jury; that the trial judge rightly held that no want of reasonable and probable cause had been shown, and his judgment should not have been set aside, and must be restored.

Archibald v. McLaren.—xxi. 588.

Mandamus—Appeal in cases of.

See JURISDICTION, 11.

2. By member of benefit society to be reinstated.

See BENEFIT SOCIETY.

3. To compel issue and delivery of debentures.

See BY-LAW, 8.

Mandamus—Continued.**4. Rule nisi for—County school rates for 1873-78—Rev. Stat. c. 32, s. 52, (N.S.).**

A *mandamus* was applied for at the instance of the sessions for the county of Halifax, to compel the warden and council of the town of Dartmouth to assess, on the property of the town liable for assessment, the sum of \$16,976 for its proportion of county school rates for the years 1873-78, under s. 52 of the Educational Act, R. S. N. S. c. 38. The Supreme Court of Nova Scotia, without determining whether the required assessment was possible and was obligatory when the writ was issued, made the rule *nisi* for a *mandamus* absolute, leaving these questions to be determined on the return of the writ.

On appeal to the Supreme Court of Canada, it was Held, Strong and Gwynne, JJ., dissenting, that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion cannot at present be questioned.

Per Ritchie, C.J.—That the town of Dartmouth is not, but that the city of Halifax is, exempted by c. 32 R. S. N. S. from contribution to the county school rates.

The Queen v. Warden and Council of the Town of Dartmouth.—ix. 509.

See MANDAMUS, 7.

5. Never granted to compel a person to do what is impossible.

See LICENSE, 3.

6. Writ of—Return to—Demurrer to return.

On an appeal from an order of the Supreme Court of Nova Scotia, quashing, on demurrer, a return to a writ of *mandamus*, and ordering a peremptory writ to issue, the objection was taken that under the practice in Nova Scotia a demurrer would not lie to a return to a writ of *mandamus*.

Held, that this objection must be over-ruled and the appeal heard on its merits.

Dartmouth v. The Queen.—12th May, 1885.

7. Rates and assessments—Municipality of county of Halifax—School rates in—Liability of town of Dartmouth to contribute to—Assessing present ratepayers for rate of previous year—Mandamus—Jurisdiction to order writ of.

Held, Ritchie, C.J., dissenting, that the town of Dartmouth is not liable to contribute to the assessment for the support of schools in the municipality of the county of Halifax.

Held, also, that if so liable a writ of *mandamus* could not issue to enforce the payment of such contribution as the amount of the same would be uncertain and difficult to be ascertained.

Mandamus—Continued.

Held, also, that the ratepayers of 1886 could not be assessed for school rates leviable in previous years.

Held, *per* Ritchie, C.J., dissenting, that only the city of Halifax is exempt from such contribution, and the town of Dartmouth is liable.

Dartmouth v. The Queen.—xiv. 45.

8. To compel school commissioners to carry out decision of Superintendent of Education. 40 V. c. 22 s. 11 (Q.).

See EDUCATION, 3.

9. Quebec Pharmacy Act (48 V. c. 36 (Q.))—Registration of partnership.

See PARTNERSHIP, 8.

10. *Relief against the Crown—Petition of Right—Direct relief.*

By the Ordnance Vesting Act, 7 V. c. 2, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by s. 29 it was enacted: "Provided always, and be it enacted that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the use of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken." The appellant, the heir-at-law of William McQueen, by her petition of right sought to recover from the Crown 90 acres of the land originally taken by Colonel By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the Crown and an indemnity for the value of such portions of these 90 acres as had been sold by the Crown.

Held, *per* Strong, J.—A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under s. 29. Where it is within the power of a party having a claim against the Crown of such a nature as the present to resort to a petition of right, a mandamus will not lie, and a mandamus will never under any circumstances be granted where direct relief is sought against the Crown.

McQueen v. The Queen.—xvi. 1.

11. *Mandamus—Judgment on demurrer—Supreme and Exchequer Courts Act, s. 24 (g), 28, 29 and 30.*

Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under s. 24 (g) of the Supreme and Exchequer Courts Act. The word "judgment" in that subsection means the final judgment in the case.

Strong and Patterson, JJ., dissenting.

Langevin v. Les Commissaires d'Ecole de St. Marc.—xviii. 599.

Mandamus—Continued.

12. To municipality—Assessment—Employment of physician by board of health—Dismissal—Form of remedy.

See MUNICIPAL CORPORATION, 14.

13. Superintendent of Education—Powers—Establishment of new school district—Appeal—Approval of three visitors—40 V. c. 22, s. 11 (P.Q.)—R. S. Q., Art. 2055.

See EDUCATION, 6.

14. Municipal corporation—Drainage of lands—Injury to other lands by—Remedy for—Arbitration—Notice of action—R. S. O. 1887, c. 184—Ont. Judicature Act, R. S. O. 1887, c. 44.

See MUNICIPAL CORPORATION, 26.

15. Municipal corporation—Drainage of lands non-completion of works—Maintenance and repair—Notice—Ont. Municipal Act, R. S. O. c. 184, s. 583.

See MUNICIPAL CORPORATION, 27.

Mandatory.—Action to account—Curator to substitution—*Negotiorum gestor*.

See WILL, 21.

Manslaughter—Indictment for—Names under alias—No evidence as to one of—Variance not fatal.

See CRIMINAL APPEAL, 12.

Maritime Court of Ontario.—*Act establishing, intra vires.*

Held, that 40 V. c. 21, establishing a court of maritime jurisdiction for the Province of Ontario, is *intra vires* of the Dominion Parliament.

“The Picton.”—iv. 648.

2. *Appeal and cross-appeal—Collision with anchor of a vessel—Contributory negligence—Damages, apportionment of.*

On the 27th April, 1880, at Port K., on Lake Erie, where vessels go to load timber, staves, etc., and where the “Erie Belle,” the respondent’s vessel, was in the habit of landing and taking passengers, the “M. C. Upper,” the appellant’s vessel, was moored at the west side of the dock, and had her anchor dropped some distance out in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, and without buoying the same or taking some measure to inform incoming

Maritime Court of Ontario—Continued.

vessels where it was. The "Erie Belle" came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the "M. C. Upper," making a large hole in her bottom. On a petition filed by the owner of the "Erie Belle," in the Maritime Court of Ontario, to recover damages done to his vessel by the schooner "M. C. Upper," the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one-half of the damage sustained by the "Erie Belle."

On appeal by owner of "M. C. Upper" and cross-appeal by owner of "Erie Belle" to the Supreme Court of Canada, Held, *per* Ritchie, C.J., and Fournier and Taschereau, JJ., that as the "Erie Belle," being managed with care and skill, went to the wharf in the usual way, and came out in the usual way, and as the "M. C. Upper" had wrongfully and negligently placed her anchor (as much a part of the vessel as her masts) where it ought not to have been, and without indicating, by a buoy or otherwise, its position to the "Erie Belle," the owner of the "Erie Belle" was entitled to full compensation, and the "M. C. Upper" should pay the whole of the damage.

Per Strong, Henry and Gwynne, JJ., that the "M. C. Upper" had a right to have her anchor where it was, and that it was not in the line by which the "Erie Belle" entered and by which she could have backed out; that the strain on the anchor chain when the crew of the "M. C. Upper" were hauling on it all the time the "Erie Belle" was at Port K. sufficiently indicated the position of the anchor, and therefore that the accident happened through no fault or negligence on the part of the "M. C. Upper."

The court being equally divided, the appeal and cross-appeal were dismissed without costs, and the judgment of the Maritime Court of Ontario affirmed.

McCallum v. Odette.—vii. 36.

3. *Jurisdiction of—Rev. Stats. Ont. c. 128—Collision—Negligence, causing death—Action in rem by mother of deceased child—Master and servant.*

The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them, "The Garland." Petition against "The Garland," libelled under the Maritime Court Act at the port of Windsor, on behalf of the appellant, claiming \$2,000 damages suffered by her, owing to the death of her son and servant, caused by the negligence of the officers in charge of said "Garland." The respondent intervened, and demurred on the ground that the petition did not set forth a cause of action against "The Garland" within the jurisdiction of the court.

Held, Fournier and Taschereau, JJ., dissenting, that the Maritime Court of Ontario has no jurisdiction apart from R. S. O. c. 128 (re-enacting in that Province Lord Campbell's Act, 9 & 10 V. c. 98), in an action for personal injury resulting in death, and therefore the appellant had no *locus standi*, not having brought her action as the personal representative of the child.

Maritime Court of Ontario—*Continued.*

Per Fournier, Taschereau, Henry and Gwynne, JJ., reversing the judgment of the Maritime Court of Ontario, that Vice-Admiralty Courts in British possessions and the Maritime Court of Ontario have whatever jurisdiction the High Court of Admiralty has over "any claim for damages done by any ship, whether to person or to property."

Per Fournier and Taschereau, JJ., dissenting, that apart from and independently of c. 128, Rev. Stats. Ont., the Maritime Court of Ontario has jurisdiction in a proceeding *in rem* against a foreign vessel for the recovery of damages for injuries resulting in death; that the appellant, either in the capacity of parent or of mistress, was entitled to claim damages for the loss of her son or servant.

Monaghan v. Horn.—vii. 409.

4. *Collision—Negligence—Damages.*

Appeal from a judgment of the judge of the Maritime Court of Ontario at Sandwich and Windsor.

The suit was brought by the owners of the tug "Minnie Morton" to recover damages occasioned by the tug being run into by and getting foul with a raft in tow of the tug "John Owen." The collision occurred on the evening of the 1st October, 1881. At the time of the collision the "Minnie Morton," which had been during that and the preceding day acting as a deck for divers, who were engaged in the endeavour to float a vessel named the Swain, then grounded to the north of Bois Blanc Island, in the Detroit River, was tied on the North side of the Swain, that is further in the channel, when the "John Owen" towing a raft of logs passed down the river to the eastward of the same island, and the tail of the raft collided with the "Minnie Morton," and carried her down the river where she sank, and could not afterwards be found. The Detroit River is divided into two channels by Bois Blanc Island, and the eastward channel on the Canadian side is used for towing rafts down that stream. The petitioner averred that the master and crew of the "Owen" in passing the point where the "Morton" was lying, negligently steered the "Owen" nearer to the island than they should have done; that the "Owen" on account of the size of the raft was unable to exercise proper control over it, and it was carried by the current in a westerly direction against the "Morton," and that the slow rate of speed at which the "Owen" proceeded in passing, either from the inability of the tug, or through the negligence of the master and crew to proceed faster, in conjunction with the neglect of the "Owen" to pursue a proper course, directly contributed to the disaster by permitting the raft to approach so near to the "Morton," and with an insufficient rate of speed to resist the action of the current.

The answer denied the charge of negligence; averred that the tug and her raft were navigated with all due skill; that the "Owen," after having passed Lime Kiln Crossing, kept as near to the easterly bank of said river as she could be kept with safety; that she was proceeding with as much speed as it was practicable to maintain; that there was a strong north-easterly wind, and that the action of the wind caused the end of the raft to be thrown toward the upper end of the island, and if it came into collision with the "Morton," the

Maritime Court of Ontario—Continued.

same was not imputable to any fault, negligence or misconduct on the part of the tug, her officers and crew.

The defendant contended that there is a great deal of traffic in the river, most of which passes to the eastward of the island referred to; that many rafts in every year, and at all seasons, are towed down the river, and such rafts vary in size, some of them numbering, according to the evidence, 4,000,000 feet; that these rafts necessarily require a great deal of room, in fact occupy while passing the Bois Blanc Island, nearly all the space of the stream navigable at this point; that the "Minnie Morton," being so lying in the channel, was at the time of the accident without any lookout or watch of any kind; that she had not any light, or if a light, that it was not of a sufficient size or brightness, nor in accordance with the statute requirement in that behalf, and that the "Minnie Morton," lying in this navigable river, not in a harbour nor at a wharf or dock, ought to have been manned so as to have easily moved out of the way of passing vessels or rafts, so as to be out of the position of danger to herself in which she was lying and out of the course of vessels lawfully navigating the stream.

The Judge of the Maritime Court pronounced in favour of the petitioners and condemned the "Owen" for all damages sustained by the petitioners in consequence of the collision and total loss of the "Morton," and fixed the damages at \$2,600.

On appeal to the Supreme Court of Canada, Held, that the finding of the judge of the court below should be affirmed. Gwynne, J., dissenting.

Appeal dismissed with costs.

Owen v. Odette.—19th June, 1883.

5. Rule of Maritime Court—Notice of appeal—Pronouncing and entry of judgment—Time for appealing.

See APPEAL, 27.

6. *Collision—Damages—Party in fault—Answering signals.*

The owners of the tug "B.H." sued the owners of the steam propellor "St. M." for damages occasioned by the tug being run down by the propellor in the River Detroit,

Held, reversing the judgment of the Maritime Court of Ontario, that as the evidence showed the master of the tug to have misunderstood the signals of the propellor, and to have directed his vessel on the wrong course when the two were in proximity, the owners of the propellor were not liable and the petition in the Maritime Court should be dismissed.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau and Gwynne, JJ.

Robertson v. Wigle—The St. Magnus.—March 19th, 1888.—xvi. 720.

Maritime Court of Ontario—Continued.

7. *Salvage—Special Contract—Action by agents of owners—Agreement to manage tug on commission.*

This was a proceeding *in rem* against the appellant's tug the "Marion Teller" to recover remuneration for services rendered by the tug "F. A. Folger" in rescuing the former when stranded on the shore of Lake Erie.

The petition states that the master of the "Marion Teller" engaged the tug "F. A. Folger" to proceed to the stranded vessel and rescue her, which the master of the latter tug agreed to do, and after working at her for some time, the "Folger" did get the "Teller" into deep water. The plaintiffs who had the management of the rescuing tug sued in their own names for salvage.

The claim was resisted on the ground that the plaintiffs were not properly salvors and had no right to bring the action, being neither owners of the tug "Folger" nor master nor mariners on board the tug, but simply agents for the owners under the following agreement:—

"It is hereby agreed between John Price, merchant, of Port Stanley, of the first part, and Odette and Wherry, merchants, of Windsor, of the second part, as follows, viz.:

"The party of the first part agrees to place his tug "F. A. Folger" in charge of the parties of the second part, for them to manage for the season of 1886, or until the said party of the first part succeeds in selling her;

"And the said parties of the second part agree to manage the said tug "F. A. Folger" and secure as much work for her as possible, and render monthly statements and remittances, less a commission of 5 per cent., on the gross earnings.

Windsor, April 28th, 1886."

It was further contended, that if the plaintiffs had any claim another vessel that assisted was also interested and should be joined, and further, that the rescue was effected in such a manner as to disentitle the plaintiffs to recover.

The Judge of the Court of Vice-Admiralty found that there was a contract with the master of the "F. A. Folger" to pay ten dollars an hour for the service and gave judgment for the plaintiffs on that basis. In addition to the other objections the appellants claimed that the judgment was not given according to the principle governing salvage claims, but that the award should have divided the money among all the persons who assisted in the rescue.

Held, reversing the judgment of the court below, that the plaintiffs were not entitled to recover.

Per Ritchie, C.J.—[after stating the facts]:

There can be no doubt it is perfectly competent for salvors instead of leaving the amount of the remuneration to be determined by the court, to agree with the master of the vessel in distress to render the required assistance for a specified sum. In such a case they will be bound by the contract and can claim no more than the stipulated amount. But, as Dr. Lushington said in the case of the "True Blue" (2 W. Rob. 176), "Now I entertain no doubt whatever that an agreement of this description can be legally made between a

Maritime Court of Ontario—Continued.

master of a vessel in distress and persons affording a salvage assistance provided there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves." I cannot understand on what principle it was ordered and adjudged that the plaintiffs do recover against the defendants intervening the sum of \$1,110 for services rendered to the "Marion Teller" together with the costs of this action. The plaintiffs rendered no services whatever. They were the mere agents of the owners for managing the tug, receiving a commission of 5 per cent. on her gross earnings.

The salvage services rendered were by the captain and crew of the tug "F. A. Folger," who, together with the owner of the said tug (which plaintiffs clearly were not), are entitled to the remuneration to be awarded for such salvage services, and the suit should have been instituted on behalf of such owners, master and crew and not by plaintiffs on their own behalf. Assuming, however, that there was a contract which the court should recognize and act on in this case which, under the evidence, may be doubtful, there is no pretence for saying there was any such contract between the master of the "Marion Teller" and the plaintiffs as would entitle them to the \$1,110 adjudged to them.

Per Henry, J.—I think that, on two grounds, the plaintiff is not entitled to recover. In the first place, I do not think it a subject of salvage. Here was a tug that got on a sand bar; she lay there eight or nine days in no danger, until the plaintiffs tug came and towed her off. I cannot see, under all the circumstances that the party agreeing to take off the vessel, can recover salvage. It is not salvage at all. Salvage is where a vessel driven on shore is saved. Here the vessel was safe. There must be something saved, but here it was mere work and labour done and performed.

The other ground is that the contract was not with the party who brings the suit. He was merely the agent of the owners and was to get a commission for managing the tug.

I think the plaintiff should not succeed for these reasons: that he was not the party who performed the service, nor one having any interest in the saving tug. The appeal should, therefore, be allowed.

Present: Ritchie, C.J., and Strong, Fournier, Taschereau, Henry and Gwynne, JJ.

In re "The Marion Teller."—Clark v. Odette.—March 15th, 1888.

8. *Towage—Claim for—Contract, authority to make.*

The "Athabasca, Algoma and Alberta," steamships belonging to the defendants, and brought by them from Glasgow to run on the Upper lakes, having to be cut in two to be taken through the St. Lawrence Canals, an arrangement was made by Mr. Henry Beatty (the person who was to manage the vessels for the defendants) with the Dominion Salvage and Wrecking Company, that this company should furnish certain tugs at certain specified rates per hour. The terms were contained in a letter from the company to Mr. Beatty, in which, after specifying the rates per hour for the tugs, and

Maritime Court of Ontario—Continued.

when the time was to begin, it is stated as follows: "The company to furnish the main towing hawser free of charge and to send Capt. John Donnelly to superintend the towing and transportation of the vessels, and to use his best endeavours to successfully complete the same, but in case you should require his services before the ordering of our boats or after their discharge, then this company to charge ten dollars per day for such extra services rendered by him." Nothing is stated in the letter as to the place from or to which the vessels were to be taken. At that time it had not been definitely settled where the vessels should be refitted. Eventually it was decided to join the two parts of the vessels at Buffalo, and fix them up at Port Colborne. The two parts of the Athabasca left Montreal in tow of tugs D. S. & W. Co. in charge of Capt. Donnelly. After passing the St. Lawrence Canals the two pieces were fastened together at Prescott, and when they got to Kingston they were refastened more securely and started for Port Dalhousie.

On arriving off Port Dalousie, Capt. Donnelly, after inquiring whether there was any telegraphic messages for him, and finding none, entered into an arrangement with George and Robert Ross, (the owners of the tug "Bennett,") the owners of the tug "Aikens," and James Noble, captain of the tug "Augusta," that these tugs should tow the two sections of the "Athabasca" from Port Dalhousie to Port Colborne, and that the owners of each tug should be paid at the rate of \$4 per hour when running, and \$3 an hour when lying still. The "Athabasca" was taken to Port Colborne by these three tugs accordingly.

The defendants refusing to pay the claim made by the owners of the tugs for these services, proceedings were taken in the Maritime Court for Ontario against the steamship. The defendants showed that before Donnelly made the bargain, Henry Beatty, the general manager of the defendants' vessels, had entered into an agreement with one John Cloy, an owner of tugs residing at Thorold, to take one or more of the vessels (at Beatty's option) through the canal at a price much less than that agreed to be paid by Donnelly, and they contended that Donnelly had no authority to make any contract for the towing of the vessels through the canal, and that before the plaintiffs did anything under the contract they had notice of this and also of the bargain with Cloy from Beatty, and were forbidden to take the vessel through the canal, and they also contended that at the time the plaintiffs made the agreement with Donnelly they were aware that an arrangement had been made with Cloy, of which Donnelly was ignorant, and that in contracting with Donnelly under the circumstances they were guilty of a fraud.

The Maritime Court for Ontario (Senkler, J.) gave judgment in favour of the owners of the tugs for the amounts claimed, holding that Donnelly had authority to make the contract with the plaintiffs, that the amounts claimed were reasonable, and that the defendants having had the benefit of the work done, they should pay therefor.

Upon appeal to the Supreme Court of Canada, it was Held, *per* Ritchie, C.J., and Fournier and Gwynne, JJ., that the appeals should be dismissed

Maritime Court of Ontario—Continued.

Henry and Taschereau, JJ., dissenting on the ground that the authority of Donnelly to make the contract was not established.

Present :—Ritchie, C.J., and Fournier, Henry, Taschereau and Gwynne, JJ.

C. P. R. v. Neelon. } "The Athabasca."—16th Nov., 1885.
v. Helliwell. }

Marriage—Declarations in Act of—Matrimonial domicile—Civil status—Arts. 63, 65, 79, 80, 81, 83, C. C. (P.Q.).

See DOMICILE, 2.

DIVORCE.

Marriage Contract—Donation in.

See DONATION.

Married Woman.

See HUSBAND AND WIFE.

Master of Ship—Dismissal of by company—Part owner.

See CONTRACT, 6.

Master and Servant—Right of action for loss of servant—By mother for death of child.

See MARITIME COURT OF ONTARIO, 3.

2. Contract—Agreement for service—Arbitrary right of dismissal—Exercise of—Forfeiture of property.

By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who in consideration thereof agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation.

By one clause of the agreement the employer was to be the absolute judge of the manner in which the employed performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal but to have no claim whatever against his employer.

M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders.

Master and Servant—Continued.

Held, reversing the judgment of the Court of Appeal for Ontario and of the Divisional Court, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, and without specifying any particular act calling for such dismissal.

Held, *per Ritchie, C.J., Fournier, Taschereau and Patterson, JJ.*, that such dismissal did not deprive M. of his claim for a share of the profits of the business.

Per Strong and Gwynne, JJ., that the share of M. in the profits was only a part of his remuneration for his services which he lost by being dismissed equally as he did his fixed salary.

McRae v. Marshall.—xix. 10.

3. Road Co.—Collector of tolls—Negligence—Liability of company.

See NEGLIGENCE, 87.

4. *Defective system of using machinery—Injury to workman—Liability of master—Notice to master.*

F. was employed in a sawmill at Vancouver, (B.C.), as a chainer, and worked on a rollway which is the portion of the machinery of the mill along which the logs are brought to the saw carriage. One of his duties was to put a chain under the log and roll it on to the carriage, and while doing so on one occasion a log rolled down the rollway and against one behind him and crushed him against the carriage, causing severe injuries, for which he brought an action against W. & E., the owners of the mill.

On the trial it was shown that chock blocks were used to check the log in its course down the rollway, which had a slope of from 5 to 7 inches in its length of 12 feet, and that the blocks were only sufficient to hold one log. The jury found that the accident was due to the slope of the rollway and defective chock blocks; that F. could not have avoided the injury by exercise of proper care and skill in discharging his duties; that he had complained of the chock blocks to the proper persons, who promised to make them good; that W. & E., the owners, were not aware of the defects, but that W., the manager and foreman, should have taken cognizance of the matter and did not appear to have exercised due care; and they assessed damages to F. at \$5,000. The trial judge reserved judgment, and a motion was afterwards made on behalf of F. for judgment and a cross-motion by defendants to set aside the findings and for a non-suit. Eventually judgment was entered against W. & E. for the damages assessed which was sustained by the Court *in banc*.

Held, affirming the decision of the Supreme Court of British Columbia, that the employers were no less responsible for the injuries occasioned to F. by the defective system of using their machinery than they would have been for a defect in the machinery itself.

Held, further, that there being no employers' Liability Act in force in British Columbia when the injury happened, F. was not precluded from

Master and Servant—Continued.

obtaining compensation by failure to give notice to his employers of the defect in the chock blocks.

Webster v. Foley.—18th December, 1892.—xxi. 580.

Mechanics Lien—Prior Mortgage—Delay—Rev. S. O. c. 120.

The period of 90 days limited by the 21st section of the Mechanics' Lien Act, R. S. O. c. 120, for the commencement of proceedings to enforce the lien applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that whether proceedings have or have not been previously taken against the owner within the 90 days.

The plaintiffs, assignees of a mechanics' lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien against the owner, they brought this action after the lapse of more than 90 days from filing their lien to obtain declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land.

Held, affirming the judgment of the Court of Appeal for Ontario, that the lien had ceased to exist as against the mortgagee.

(For a full statement of the facts see *Bank of Montreal v. Haffner*, 3 Ont. Rep. 183 and 10 Ont. App. R. 592.)

Appeal dismissed with costs.

Bank of Montreal v. Worswick.—12th May, 1885.

2. Materials supplied to contractor—Payment by promissory note—Suspension of lien—Waiver.

E. supplied a contractor with materials for building a house for W. and took the contractor's note for \$1,100 at thirty days for his account. The note was discounted but dishonoured at maturity, and E. took it up and registered a mechanic's lien against the property of W. While the note was running, W. paid the contractor \$500 and afterwards, but when was uncertain, \$600 more. In an action by E. to enforce his lien:

Held, affirming the judgment of the Supreme Court of British Columbia, that as the lien was suspended during the currency of the note it was absolutely gone, there being nothing in the Lien Act to show that it could be abandoned for a time only, and this result would follow even if part of the amount only had been paid to the contractor.

Edmonds v. Tiernan.—xxi. 406.

Mediators—Submission to—Award—Finality of—Art. 1346, C. C. P.

See ARBITRATION AND AWARD, 24.

Mercantile Agency—Responsible for false information when supplied through culpable negligence, imprudence or want of skill.

See DAMAGES, 57.

LIBEL, 5.

Merchants' Shipping Act, 1854 (Imp.)—Does not prevent property in ship passing to assignee under Insolvent Act, 1875.

See INSOLVENCY, 13.

Mesne Profits—In action for use and occupation.

See TENANTS IN COMMON.

Militia Act—31 V. c. 40, s. 27—36 V. c. 46—42 V. c. 35—*Disturbance anticipated or likely to occur—Requisition calling out militia—Sufficiency of form of—Suit by commanding officer—Death of commanding officer pending suit—Right of administratrix to continue proceedings.*

The Act, 31 V. c. 40, s. 27, as amended by 36 V. c. 46 and 42 V. c. 35, requires that a requisition calling out the militia in aid of the civil power to assist in suppressing a riot, etc., shall be signed by three magistrates, of whom the warden, or other head officer of the municipality shall be one; and that it shall express on its face "the actual occurrence of a riot, disturbance or emergency, or the anticipation thereof, requiring such service."

Held, that a requisition in the following form is sufficient:—"Charles W. Hill, Esq., Captain No. 5 Company, Cape Breton, Militia: Sir,—We, in compliance with c. 46, s. 27 Dominion Acts of 1873, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power to suppress. You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed. A. J. McDonald, Warden; R. McDonald, J.P.; J. McNarish, J.P.; Angus McNeil, J.P."

The statute also provides that the municipality shall pay all expenses of the service of the militia when so called out, and in case of refusal that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses.

Held, Strong, J., dissenting, that where the commanding officer died pending such action the proceedings could be continued by his personal representative.

Crowe-Read v. County of Cape Breton.—xiv. 8.

Mines and Minerals—Mining lease—Application for—Right of entry—Conditions precedent—Conflicting titles to land.

Held, affirming the judgment of the court below, that where a mining lease is obtained over private lands in Nova Scotia the lessees must obtain from the owners of the land permission to enter either by special agreement or in accordance with the provisions of the Mining Act.

Mining leases may be granted in all districts whether proclaimed or unproclaimed.

A mining lease is not invalid because it includes a greater number of areas than is provided by the statute (R. S. N. S. 4th ser. c. 9), such provision being only directory to the commissioner.

The issue of a lease cures any irregularities in the application for a license or in the license itself in the absence of fraud on the part of the licensee.

Fielding v. Mott.—xiv. 254.

2. Public Lands—Transfer of to Dominion of Canada—Effect of—Precious metals—Claim of Dominion Government to—Provincial—B. N. A. Act, s. 92, s-s. 5, ss. 109 & 146—47 V. c. 14, s. 2 (B.C.).

By s. 11 of the Order in Council passed in virtue of s. 146 of the B. N. A. Act, under which British Columbia was admitted into the Union it was provided as follows:—And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway (C.P.R.) a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, not to exceed however twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba. By 47 V. c. 14, s. 2, (B.C.), it was enacted as follows:—From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government, for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located to a width of twenty miles on each side of the said line, as provided in the Order in Council, s. 11, admitting the Province of British Columbia into Confederation. A controversy having arisen in respect to the ownership of the precious metals in and under the lands so conveyed, the Exchequer Court, upon consent and without argument, gave judgment in favour of the Dominion Government. On appeal to the Supreme Court: **Held**, affirming the judgment of the Exchequer Court, Fournier and Henry, JJ., dissenting, that under the order in council admitting British Columbia into Confederation and the statutes transferring the public lands

Mines and Minerals—Continued.

described therein, the precious metals in, upon, and under such public lands are now vested in the Crown as represented by the Dominion Government.

Attorney General of British Columbia v. Attorney General of Canada.
—xiv. 845.

[The judgment in this case was, on appeal to the Privy Council, reversed.
14 App. Cases 295.] -

3. Interest in mine—Agreement as to—Partnership—Evidence.

See PARTNERSHIP, 7.

4. Lease or license to work iron ores—Construction of instrument
—8 Anne c. 14, s. 1.

See LEASE, 5.

5. Mining lease—Covenants—Liability to pay rent or royalty
according to quantity of ore found—Right of lessee to terminate lease.

See LEASE, 6.

6. Agreement between two persons to buy mining lands on speculation—Renewal of agreement from time to time—Secret sale by one partner—Relation back of sale to date of original agreement.

See PARTNERSHIP, 11.

7. Lease of mining rights—Option of locating—Estoppel.

See ESTOPPEL, 13.

Minor.—Sale to tutor—Prescription—Arts. 2243, 2253, C. C.

See TUTOR AND MINOR, 1.

2. Obligation of—Loan to tutor without authority—Ratification—
Use of money for benefit of—Personal remedy—Arts. 297,
298, C. C.

See TUTOR AND MINOR, 4.

3. Commercial or joint stock company—Shares held "in trust"
for minor—Sale of—Tutor—Arts. 297, 298 & 299, C. C.

See TRUSTS AND TRUSTEES, 18.

Mischievous Animal—*Injury committed by—Ownership—Scienter—Evidence for jury.*

W. brought an action for injuries to her daughter committed by a dog owned or harboured by the defendant, V. The defence was that V. did not own the dog,

Mischievous Animal—Continued.

and had no knowledge that he was vicious. On the trial it was shown that the dog was formerly owned by a man in V.'s employ, who lived and kept the dog at V.'s house. When this man went away from the place he left the dog behind with V.'s son, to be kept until sent for, and afterwards the dog lived at the house, going every day to V.'s place of business with him or his son, who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial judge ordered a non-suit, which was set aside by the full court, and a new trial ordered.

Held, affirming the judgment of the court below, that there was ample evidence for the jury that V. harboured the dog with knowledge of its vicious propensities, and the non-suit was rightly set aside.

Present :—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Yaughan v. Wood.—March 10, 1890.—xviii. 703.

Misdirection—Application for policy of insurance—Answers of applicant—Reasonably fair and truthful.

See INSURANCE, LIFE, 9.

2. In not submitting question to jury.

See INSURANCE, MARINE, 21.

3. Direction to jury—Action for libel—Innuendoes—Withdrawal of from jury—Prejudice to defendant—Excessive damages.

See LIBEL, 4.

PRACTICE, 11.

4. Charge to jury—Refusal to instruct jury as to what constitutes fraud under Statute of Elizabeth—Taking accounts—New trial.

See PRACTICE, 20.

5. *New trial ordered by court below—Interference with order for—Negligence—Damage by fire—Spark arrester.*

On the trial of an action for damages for the destruction of a barn and its contents by fire, alleged to have been caused by negligence of defendants in working a steam engine used in running a hay press in front of said barn, the main issue was as to the sufficiency of a spark arrester on said engine, and the learned judge directed the jury that "if there was no spark arrester in the engine that in itself would be negligence for which defendants would be liable." Plaintiff obtained a verdict which was set aside by the court *en banc*, and a new trial ordered for misdirection. On appeal to the Supreme Court of Canada :

Misdirection—Continued.

Held, Strong, J., dissenting, that the judge misdirected the jury in telling them that the want of a spark arrester was, in point of law, negligence and such direction may have influenced them in giving their verdict; therefore the judgment ordering a new trial should not be interfered with.

Peers v. Elliott.—xxi. 19.

Misfeasor, Joint—Judgment obtained against—Effect of.

See PETITION OF RIGHT, 15.

PRACTICE, 43.

Misrepresentation—By co-obligor, as to effect of bond.

See AGREEMENT, 11.

2. **By vendor of patent, as to duration of right.**

See PATENT OF INVENTION, 2.

3. **By promoters of company—False statements in prospectus—
Fraudulent concealment—Action for deceit.**

See CORPORATIONS, 24.

4. **Fraudulent, as to security given in payment of goods.**

See SALE OF GOODS, 14.

5. ***Contract, rescission of—Fraud—Proof of.***

A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit.

Bell v. Macklin.—xv. 576.

Mitoyennete.—Common wall.

Held, that an owner of property adjoining a wall cannot make it common unless he first pays to the proprietor the part he wishes to render common, and half the value of the ground on which such wall is built.

Joyce v. Hart.—l. 321.

**Monopoly—Telegraph line—Contract by foreign corporation for
—Exclusive right over line of railway—Restraint of trade.**

See CONTRACT, 36.

CORPORATIONS, 43.

"More or Less"—Effect of—Lands sold by the acre.

See SALE OF LANDS, 22.

Mortgage—Agreement to postpone—Non-registration—Priority.

In 1861, W. M., the owner of real estate, created a mortgage thereon in favour of J. T. for \$4,000. In 1868 he executed a subsequent mortgage in favour of J. M., the appellant, to secure the payment of \$20,000 and interest, which was duly registered on the day of its execution. In 1866, W. M. executed another mortgage to the respondent C., for the sum of \$4,000, which was intended to be substituted for the prior mortgage of that amount, and the money obtained thereon was applied toward the payment thereof, and J. M. executed an agreement under seal—a deed poll—consenting and agreeing that the proposed mortgage to respondent C. should have priority over his. In 1875, J. M. assigned his mortgage for \$20,000 to the Quebec Bank, without notice to the bank of his agreement, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which C. had neglected to register. C. filed his bill against the executors of W. M., and against J. M. and the bank. The Court of Chancery held that the respondent was not entitled to relief upon the facts as shown, and dismissed the bill. The Court of Appeal affirmed the decree as to all the defendants, except as to J. M., who was ordered to pay off the respondent's (plaintiff's) mortgage, principal and interest, but without costs. J. M. thereupon appealed to the Supreme Court of Canada.

Held, affirming the judgment of the Court of Appeal, Strong, J., dissenting, that as appellant could not justify the breach of his agreement in favour of C., he was bound both at law and in equity to indemnify C. for any loss he sustained by reason of such breach.

McDougall v. Campbell.—vi. 502.

2. **Limitations—Statutes of—C. 84, s. 40 and c. 85, ss. 1 & 6, Con. Stats. N.B.—Covenant in mortgage deed—Payment by co-obligor.**

J. H. borrowed \$4,000 from M. C. on the 27th September, 1850, at which date J. H. & J. W. gave their joint and several bond to M. C., conditioned for the repayment of the money in five years, with interest quarterly in the meantime. At the same time, and to secure the payment of the \$4,000, two separate mortgages were given: one by J. H. and wife on H.'s wife's property, and one by J. W. and wife on W.'s property. Neither party executed the mortgage of the other. The mortgage from J. W. contained a provision that upon repayment of the sum of £1,000 and interest, according to the condition of the bond, by J. W. and J. H., or either of them, their, or either of their, heirs, etc., then said mortgage should be void; a similar provision being inserted in the mortgage from J. H. The bond and mortgages were assigned to L. *et al.* (the appellants) in 1870, and the principal money has never been paid. J. W. died in 1858, and by his will devised all his residuary real estate, including the lands and premises in the above-mentioned mortgage, to G. W. (one of the respondents) and others. J. W., in his lifetime, was, and since his death the respondents have been, in possession of the premises so mortgaged by J. W. Neither J. W., nor any person claiming by, through, or under him, ever paid any interest on said bond and mortgage, or gave any acknowledgment in writing of the title of M. C., or her assigns. J. J. H., the co-

Mortgage—Continued.

obligor, paid interest on the bond from its date to 27th March, 1870. On 20th January, 1881, under Consolidated Statutes of New Brunswick, c. 40, a suit of foreclosure and sale of the premises mortgaged by J. W. was commenced by the appellants in the Supreme Court of New Brunswick in equity, and the court gave judgment for the respondents.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, Strong, J., dissenting,—1. That all liability of J. W.'s personal representatives and of his heirs and devisees to any action whatever upon the bond was barred by ss. 1 & 6 of c. 85 Consolidated Statutes of New Brunswick, although payment by a co-obligor would have maintained the action alive in its integrity under the English Statute 3 & 4 William IV. c. 42.

2. That the right of foreclosure and sale of the lands included in the J. W. mortgage was barred by the Statute of Limitations in real actions, Cons. Stats. (N. B.), c. 84, s. 40.

Per Gwynne, J.—The only person by whom a payment can be made, or an acknowledgment in writing can be signed, so as to stay the currency of the Statute of Limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor, or some person in privity of estate with him, or the agent of one of such persons, and that moneys paid by J. H. in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by W.'s mortgage.

Lewin v. Wilson.—ix. 637.

[The case was appealed to the Privy Council and the judgment of the Supreme Court reversed. See 11 App. Cases, 639.]

8. Mortgagee of vessel who assigns as collateral security has an insurable interest—Notice of abandonment by.

See INSURANCE, MARINE, 5.

4. R. S. O. c. 104—Wrongful distress for mortgage money.

A mortgage made in pursuance of the Act respecting Short Forms of Mortgages, R. S. O. c. 104, contained the clauses mentioned in the statute, and among the rest those which provided that the mortgagees on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession. In addition to the statutory clauses the mortgage contained the following provision and variation: "And the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the company, subject to the said proviso."

Held, *per* Strong, Fournier and Henry, JJ., affirming the judgment of the Court of Appeal for Ontario, Ritchie, C.J., and Taschereau and Gwynne, JJ., *contra*, that upon the proper construction of the deed there was no reservation of rent entitling the mortgagees to claim a landlord's right as against an

Mortgage—Continued.

execution creditor of a year's arrears of interest on their mortgage before removal of goods on mortgaged premises by the sheriff.

The court being equally divided the appeal was dismissed without costs.

Trust & Loan Company v. Lawrason.—x. 679.

5. Of shares.

See CORPORATIONS, 11.

6. *Of estate tail—Statutory discharge, effect of—R. S. O. c. 111, ss. 9 & 67.*

Held, reversing the judgment of the court below, Henry, J., dissenting, that the execution and registration, in accordance with the Revised Statutes of Ontario, c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail.

Lawlor v. Lawlor.—x. 194.

7. By railway company of road.

See RAILWAYS AND RAILWAY COMPANIES, 1.

8. *Statute of frauds—Bill for redemption—Absolute deed—Parol evidence to show that it was to take effect as a mortgage held admissible—Evidence of plaintiff uncorroborated insufficient—36 V. c. 10 (O.).*

The bill, which was filed in 1876 by the children and heirs at law of Jesse W. Rose, alleged that the deceased had, in 1861, conveyed certain real estate to his brother, Isaac Newton Rose, upon the expressed trust that he would advance him \$1,000, and hold the property as security for the repayment of that sum with interest; that he never did advance that sum; that Jesse W. Rose died in 1872; that Isaac Newton Rose died in 1874, having devised this property to his son; that the trusts upon which it had been conveyed had been fulfilled; and sought an account of Isaac Newton Rose's dealings therewith. The defendant, the executor and executrix of Isaac Newton Rose, set up an absolute sale, and relied on the Statute of Frauds and the Statute of Limitations.

The evidence will be found set out fully in the report of the case in the court below (*see* 8 Ont. App. R. 309); part of such evidence consisted of the testimony of Colin Henderson Rose, one of the plaintiffs, a son of Jesse W. Rose, to the effect that his father being in difficulties in 1861, Isaac Newton Rose told him (C. H. R.) that he would take an assignment of the property, pay off certain mortgages thereon, advance Jesse W. Rose \$1,000 and reconvey it at any time.

Proudfoot, V.-C., made a decree directing an account, and allowing the plaintiffs to redeem the lands on payment of the amount due to the defendants in respect of the advances made.

The Court of Appeal for Ontario held that the evidence showed the transaction to be a sale, and reversed the decree, Patterson, J.A., being of opinion

Mortgage—Continued.

that oral evidence was not admissible to vary the deed, and Burton, J.A., being of opinion that the evidence of Colin required corroboration under 36 V. c. 10, (O.). Blake, V.-C., dissented, holding that parol evidence was admissible, and that he was not prepared to decide against the judgment of the V.-C. in determining the weight to be attached to the evidence.

On appeal to the Supreme Court of Canada, **Held**, that parol evidence was admissible to show that the absolute conveyance was intended to take effect as a mortgage, but the judgment of the court below, so far as it proceeded upon the ground that the testimony of the plaintiff, Colin Henderson Rose, required confirmation, was correct and ought to be affirmed.

Appeal dismissed with costs.

Rose v. Hickey.—13 March, 1880.

9. *Deed intended to operate as—Purchase for value without notice—Registration—Mortgage or sale—Purchase with agreement to resell—Amendment, right to order, under A. J. A. (O.), s. 50.*

The plaintiff, alleging herself to be the owner of the land in dispute, filed her bill alleging that she conveyed the said lands on the 31st day of August, 1866, to one James McFarlane, deceased, by a deed absolute in form, but which was intended to be a security only for the repayment of the sum of \$500, then advanced by McFarlane to her; that subsequently McFarlane, by deed absolute in form, dated the 13th of June, 1871, conveyed the lands, to defendants Rose and McKenzie; that Rose and McKenzie had at the time of the conveyance to them notice of the plaintiff's rights; that subsequently and on the 21st of June, 1872, the defendants Rose and McKenzie conveyed the lands, by deed absolute in form, to the defendant Thomas Burke; that Burke had, before the time of the conveyance to him, notice of the plaintiff's rights; that in order to secure the payment of part of his purchase money to the defendants Rose and McKenzie, Burke mortgaged the lands to them by indenture of mortgage dated the 12th day of July, 1872, which they subsequently assigned to one Watson; and she prayed that it might be declared that the deed to McFarlane was intended to operate only as a security and that the plaintiff might be let in to redeem the lands; and that the defendant Burke might be restrained from cutting timber and ordered to account for the timber cut; and that the defendants might be ordered to remove the mortgage made to Rose and McKenzie, and for other relief.

By their answers, the defendants, Rose, McKenzie and Burke, while admitting that the conveyance to McFarlane was intended only to operate as a security, denied that they had any notice of that fact, and claimed to be entitled to hold the lands as purchasers for value without notice of the plaintiff's claim.

The cause was heard by Spragge, Chancellor, before whom evidence on the part of the plaintiff and defendants was taken on the 5th of May, 1875. During the progress of the cause, and before the evidence had all been adduced, and before any argument of the case, an application was made to his Lordship,

Mortgage—Continued.

on behalf of the defendant Burke, for leave to file a supplemental answer, setting up the registry laws as a defence to the plaintiff's claim. This was refused, and a decree was made declaring that the conveyance to McFarlane was only as security for the payment of the \$500; that Rose and McKenzie bought with actual knowledge of the plaintiff's claim, and that Burke bought from them with actual notice.

Burke then appealed to the Court of Appeal for Ontario, which court held that the evidence did not shew that Burke had actual notice of the plaintiff's claim when he purchased, that the amendment should have been allowed, and that the Court of Appeal had power then to allow it under the A. J. Act, s. 50, but as it would not be proper to conclude the plaintiff without an opportunity of producing further evidence, the case was sent down for another hearing.

Proudfoot, V.-C., dissented, on the ground that the permission to amend was in the discretion of the judge, and that the court should not interfere with his decision. See *McFarlane v. Peterkin*, 4 Ont. App. R. 25. .

On appeal to the Supreme Court of Canada, Held, *per* Gwynne, J., delivering the judgment of the court, that the judgment refusing the amendment was properly appealable to the Court of Appeal for Ontario, but when that court had made an order allowing the amendment in the exercise of its discretionary power, it might be doubted whether the Supreme Court had jurisdiction to entertain an appeal from such order. Assuming the Supreme Court to have such jurisdiction, it should be chary in exercising it, lest by so doing it should injuriously fetter the very extensive discretion in matters of amendment with which the Legislature of Ontario had thought fit to invest all courts in that province.

The doctrine that where a purchaser without notice has paid a portion of the purchase money and has given a mortgage for the balance, and before payment of this mortgage becomes affected with notice of an equitable title in plaintiff, who subsequently files a bill to set aside the sale, the purchaser shall be entitled to no relief or consideration whatever in a court administering equity in respect of the purchase money paid before he became affected with notice, was questioned in *Totten v. Douglas*, 18 Grant, 352, and the assertion of it in this case for the purpose of supporting the decree was also a reason for affirming the allowance of the amendment. These claims of transfers of the legal estate to relations upon an alleged verbal promise to hold as a mortgage subject to redemption, or to recovery upon repayment of a sum of money, ought to be scrutinized with the utmost jealousy, but more especially when the rights of third persons who have paid large sums of money to the apparent owners upon the faith of their title being good are brought in question, and it might prove promotive of the ends of justice that the allowance of the proposed amendment would give further opportunity for the consideration of this point.

Further, the decree took no notice of the interests of Watson, the assignee of the mortgage, who could not be deprived of the estate by anything done in the suit as constituted.

Per Ritchie, C.J., dissenting.—The Supreme Court should determine whether or not the Chancellor was right in his opinion that the amendment

Mortgage—Continued.

refused by him, and directed by the Court of Appeal, would not on the facts as proved be of any avail to the defendants if it had been on the record at the time of his decision; and if not the amendment should not have been allowed by the Court of Appeal, but the judgment of the Chancellor should have been affirmed.

Appeal dismissed with costs, Ritchie, C.J., and Henry, J., dissenting.—21st June, 1880.

The defendant Burke subsequently put in a supplemental answer denying notice of the plaintiffs claim, and claiming the protection of the registry laws, and that he was a purchaser for value without notice. The case was again brought on for the examination of witnesses and hearing, on 31st March, 1881, before Spragge, C., who held that the defendant had notice of the plaintiff's claim at the time he purchased, and was not a *bona fide* purchaser for value without notice.

On appeal to the Court of Appeal for Ontario that court was equally divided. See *sub nomine McFarlane v. Peterkin*, 9 Ont. App. R. 429.

On appeal to the Supreme Court of Canada, Held, Gwynne, J., dissenting, that the redeemable character of the transaction being admitted on the pleadings, was not open to discussion. The only point to consider was whether the learned Chancellor was wrong in finding as matter of fact that the defendants had actual notice. If they had actual notice this would defeat the registered title. The court being unable to say the learned Chancellor was wrong, thought the appeal should be dismissed.

Per Gwynne, J., dissenting, that the transaction was a sale of the land to McFarlane, and the evidence only established that McFarlane verbally and voluntarily, and so in a manner not binding upon him, promised James Peterkin, who acted as plaintiff's agent, and whom McFarlane regarded as selling the land although the deed was made by the plaintiff, that he might re-purchase the land, and that he (McFarlane) would resell and reconvey it to him upon repayment of the sum of \$500 at any time during his (McFarlane's) lifetime; and further, that there was no evidence establishing any notice whatever binding upon the defendant Burke, or which could have any effect to defeat his purchase. Appeal dismissed with costs.

Rose v. Peterkin.—12th January, 1885.—xiii. 677,

10. *Assignment of mortgages as collateral security—Duty of Assignee as to collecting—Bond, action on—Equitable plea—Transfer of action to Court of Chancery under Administration of Justice Act, (O).*

Action on a bond conditioned to pay the sum of £18,250 on 1st July, 1863, with interest at six per cent. half yearly in advance. Plea upon equitable grounds, in substance, that before the making of the bond the plaintiffs through the late John Hillyard Cameron, their trustee and manager, agreed to advance to defendants the sum of £18,250 by transferring to them certain sterling debentures of the town of St. Catharines to that amount, for which the defendants should give to the plaintiffs good mortgages upon real estate to be

Mortgage—Continued.

approved by plaintiff's said manager, and that in the meantime the defendants should execute said bond, but that the debentures should only be handed over to the defendants as and when such approved mortgages should be delivered to the plaintiffs; that defendants assigned certain mortgages and executed others upon their own real estate, which were accepted and approved by plaintiff's manager, who handed over debentures amounting at their par value to £14,000 *stg.*; that plaintiffs realized upon some, if not all, the mortgages, and defendants also paid large sums on account and defendants believed their bond was fully paid, but had received no account, and as the payments were numerous and extended over many years and the accounts were complicated, they prayed that the suit should be transferred under the Admn. of Justice Act to the Court of Chancery and the accounts there taken. The case was transferred to the Court of Chancery, where with the consent of the parties, a decree was made referring it to the Master to take the account between the parties. The Master made his report and the defendants appealed therefrom on three grounds:—

1. Because the Master had not charged the plaintiffs with the amount of a draft for \$1,697 with interest.
2. Because the Master ought to have charged the plaintiffs with the difference between £2,000 in sterling debentures and \$8,000 currency, the amount due on a mortgage, referred to as the Ross mortgage.
3. Because the Master ought to have charged plaintiffs with interest on \$6,484 (the amount of a mortgage given by one McQueen and assigned to the plaintiffs) from 10th August, 1859.

The first ground of appeal turned entirely on the weight to be given to the evidence on one side or the other respecting the draft in question, which the plaintiffs contended was an accommodation draft given by one of the defendants to their manager, the defendants alleging that it was given in payment of an instalment of interest. Proudfoot, V.-C., allowed the appeal on this ground and his judgment was upheld by both the Court of Appeal and the Supreme Court of Canada.

As to the second ground of the appeal, it appeared that among the mortgages assigned to the plaintiffs was one for \$6,484, bearing interest at 6 per cent., executed by one McQueen upon certain land sold to him by one of the defendants to secure the balance of purchase money. The land was subject to a mortgage for \$8,000, called the "Ross Trust Mortgage," and, at the time of the sale to McQueen, it was agreed the defendants should pay off this prior mortgage. At the time of the assignment of the mortgage to the plaintiffs they were informed of this agreement, and to secure the plaintiffs, their manager retained two of the sterling debentures amounting to £2,000 to pay this mortgage for \$8,000. The defendants claimed that the plaintiffs were responsible for the application of the \$8,000 out of the proceeds of the debentures from the 9th March, 1860, the date of the assignment of the mortgage, or that they should only be charged with \$8,000 of the £2,000 sterling. The plaintiffs contended that nothing should be allowed, because their manager was also the manager of the Ross estate, and that the defendants consented to his retaining the two debentures in his character as agent of the Ross estate to be

Mortgage—Continued.

applied in satisfaction of the Ross mortgage, which was not satisfied until 1875.

Proudfoot, V.-C., Held, that the *onus* lay upon the plaintiffs to establish clearly that the debentures passed from them to the defendants, and were held by Cameron as agent of the Ross trust and not as their agent, and as the evidence was insufficient to support this contention the plaintiffs should bear the loss.

This holding was also upheld by both the Court of Appeal and the Supreme Court of Canada.

As to the third ground of appeal—although the plaintiffs took proceedings on the McQueen mortgage, the suit was conducted in such a dilatory manner that the final order of foreclosure was not obtained till 2nd April, 1875, and the property was then sold by plaintiffs to McQueen at a price much less than the principal and interest upon the original mortgage amounted to.

Proudfoot, V.-C., Held, that the defendants were not merely in the position of sureties for the assigned mortgages, who could not make the plaintiffs liable for mere delay in proceeding upon the mortgages, but that when mortgages, or judgments, or securities of these kinds are assigned, the assignees are affected with a trust in regard to them, which imposes upon them the duty of diligence in their management; the assignment removing the property from the control of the debtor, and placing it within the control of the creditor, imposes upon him the duty of using proper exertions to render it effectual for the purpose for which it was assigned. The plaintiffs were therefore liable for not having collected the interest in question; it having been lost by the wrongful act of themselves, or their manager, for whose conduct they were responsible.

The Court of Appeal and the Supreme Court of Canada affirmed the judgment of Proudfoot, V.-C.

Appeal dismissed with costs.

The Synod of the Diocese of Toronto v. De Blaquiére.—12th Feb. 1881.

11. Agreement in general terms to give a mortgage in part payment of purchase money is not complied with by assigning a second mortgage.

See SALE OF LANDS, 11.

12. Foreclosure of mortgage—Sale of land under—Right to sue for residue of debt—Prohibition.

The testator, Michael Kearney, jr., had given to the plaintiff a mortgage on certain lands to secure the payment of some \$7,000 due to the plaintiff, and had also given to the plaintiff a bond conditioned for the due payment of said debt according to the terms of the said mortgage. The mortgagor made default in payment of the said money, and the mortgage was foreclosed, and the mortgaged premises were sold by the sheriff, according to the usual practice, and bought in by the plaintiff for \$4,000. The sheriff's report of the proceedings under the decree of foreclosure and the sale of said land and

Mortgage—Continued.

application of the proceeds, was duly confirmed by the court, and there being still some \$3,000 due the plaintiff, he brought this action on the bond. The special case admitted that the proceedings in the foreclosure suit were regular in every respect, and also that the plaintiff had since the said sale conveyed the lands in question to a third party. The defendant applied for a writ of prohibition to restrain the plaintiff from proceeding with the action, claiming that such action opened up the foreclosure, and the plaintiff, not being in a position to re-convey the mortgaged premises to the defendant, or the heirs of the mortgagor, his remedy on the bond was barred.

The Supreme Court of Nova Scotia held that the English rule did not apply, as the practice was different in Nova Scotia, the sale of the mortgaged lands not being the act of the mortgagee but of the court, and refused the writ.

On appeal to the Supreme Court of Canada, *Held*, affirming the judgment of the court below, that the mortgagee was not prohibited from proceeding on the bond to recover the residue of his debt.

Appeal dismissed with costs.

Chisholm v. Kenny.—16th February, 1886.

13. Of interest in ship.

See INSOLVENCY, 18.

14. Mechanic's lien as against prior mortgagee.

See MECHANICS LIEN.

15. *Assignment of equity of redemption in trust—Reconveyance—Foreclosure against trustee—Subsequent sale—Power of sale, exercise of, by deed after foreclosure.*

Kelly gave a mortgage of leasehold premises to respondents, with covenant authorizing them to sell on default, with or without notice to the mortgagor, and at either public or private sale. The mortgage conveyed the unexpired portion of the current term and "every renewed term." Afterwards Kelly conveyed the equity of redemption in the mortgaged premises to one O'S., in trust, to carry out certain negotiations, and left the country. During his absence the lease of the ground expired, and it was renewed in the name of O'S. Default having been made in payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, prior to which O'S., having been threatened with such suit, reconveyed equity of redemption to Kelly, but deed was never delivered. O'S. then filed an answer and disclaimer of interest in said suit, which he afterwards withdrew and consented to a decree, and the mortgagees subsequently sold the mortgaged premises to the defendant Damer for a sum less than the amount due on the mortgage; the deed to Damer recited the proceedings in foreclosure and purported to be made under the decree.

Kelly brought suit to have the decree of foreclosure opened and cancelled, the deed to Damer set aside, and to be allowed to come in and redeem the premises.

Mortgage—Continued.

Held, affirming the judgment of the Court of Appeal (11 Ont. App. R. 526) Strong and Henry, JJ., dissenting, that even if the decree of foreclosure were improperly obtained, and consequently void, yet the sale to Damer was a proper exercise of the power of sale in the mortgage and should be sustained, and that it passed the renewed term which was included in the mortgage.

Appeal dismissed with costs,

Kelly v. Imperial Loan Ins. Co.—16th Nov., 1885.—xi. 516.

16. Foreclosure and sale—Purchase by mortgagee—Right to redeem—Statute of limitations—R. S. Ont. c. 108, s. 19—Trustee for sale—Acquiescence.

In a foreclosure suit against the heirs of a deceased mortgagor, who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee, who had not received permission from the court to bid; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to the defendant L., a *bond fide* purchaser, without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands brought by the heirs of the mortgagor some eighteen years after the sale and more than five years after some of the heirs had become of age (*See* 9 Ont. App. R. 537),

Held, reversing the judgment of the Court of Appeal, that the suit being one impeaching a purchase by a trustee for sale the statute of limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of B. S. O. c. 108 s. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L.

Held, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing their suit, they could not be said to acquiesce in the possession of the defendants.

Faulds v. Harper.—xi. 639.

17. Assignment of mortgage—Purchase of equity of redemption by sub-mortgagee—Sale of same by him—Liability to account.

The assignee of a mortgage obtained a release of the equity of redemption which he sold for a sum considerably in excess of his claim against the assignor. In a suit to foreclose the latter's interest,—**Held**, reversing the judgment of the Court of Appeal and restoring that of the Common Pleas Division, that he was bound to account for the proceeds of such sale.

McLean v. Wilkins.—xiv. 22.

Mortgage—Continued.

18. *Will—Devisee under—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under—Conveyance by purchaser at sale under decree—Assignment of mortgage—Statute confirming title—5 Geo. II. c. 7, (Imp.)—R. S. N. S. 4th ser. c. 36, s. 47.*

A. M. died in 1838 and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the said real estate to one H. P. T. which were subsequently foreclosed, but no sale was made under the decree in such foreclosure suit. In 1841 the mortgages and the interest of the mortgagee in the foreclosure suit were assigned to one J. B. U. who, in 1849, assigned and released the same to M. M. In 1841 M. M. the administrator with the will annexed of the said A. M., filed a bill in Chancery under the Imperial Statute 5 Geo. II. c. 7. for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor in Council, under a statute of the Province, for leave to sell the same, which was refused. A decree was made in this suit and the lands sold, the said M. M. becoming the purchaser. She afterwards conveyed said lands to the Commissioners of the Lunatic Asylum, and the title therein passed, by various Acts of the Legislature of Nova Scotia, to the present defendants. M. K., devisee under the will of A. M., brought an action of ejectment for the recovery of the said lands, and in the course of the trial contended that the sale under the decree in the Chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor in Council. The validity of the mortgages and of the proceeding in the foreclosure sale were also attacked. The action was tried before a judge without a jury and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb.

On appeal to the Supreme Court of Canada: **Held**, affirming the judgment of the court below, that even if the sale under the decree in the Chancery suit was invalid, the title to the land would be outstanding in the mortgagee, H. P. T., or those claiming under her, the assignment of the mortgages being merely a release of the debts and not passing the real estate, and the plaintiff, therefore, could not recover in an action of ejectment.

Semble, that such sale was not invalid but passed a good title, the Statute 5 Geo. II. c. 7, being in force in the Province. Henry, J., *dubitante*.

Held, also, that the statute c. 86, s. 47, R. S. 4th series (N.S.), vested the said land in the defendants if they had not a title to the same before. Henry, J., *dubitante*.

Kearney v. Greelman.—xiv. 33.

19. *Collateral security for mortgage—Promissory note—Accommodation—Partnership—New mortgage—Dissolution of partnership—Retirement of borrower of note—Liability of remaining partner.*

See PARTNERSHIP, 9.

Mortgage—Continued.

20. Mortgage to bank as security for advances—Bank taking forged paper in renewal of notes—Release of surety.

See BANKS AND BANKING, 15.

21. *Sale of mortgaged lands—Power of attorney—Authority of agent—Sale on credit—Power of sale in mortgage—Application of proceeds—Duty of purchaser.*

A power of attorney by mortgagees authorized their agent to enter and take possession of the mortgaged lands and sell the same at public or private sale, and for the best price that could be gotten for them, and to execute all necessary receipts, &c., which receipts "should effectually exonerate every purchaser or other person taking the same from all liability of seeing to the application of the money therein mentioned to be received and from being responsible for the loss, mis-application or non-application thereof." The agent took possession and sold the land, receiving part of the purchase money in cash and the balance in a promissory note of the purchaser payable to himself, which he caused to be discounted and appropriated the proceeds. The purchaser paid the note to the holders at maturity.

Held, affirming the judgments of the court below, that the power of attorney did not authorize a sale upon credit, and the sale by the agent was, therefore, invalid, and the purchaser was not relieved by the above clause from seeing that the authority of the agent was rightly exercised. The sale being invalid the subsequent payment of the note by the purchaser could not make it good.

Rodburn v. Swinney.—xvi. 297.

22. Fire insurance—Insurable interest—Mortgagee—Assignment of policy.

See INSURANCE FIRE, 22.

23. Null and void—Granted by tutor—Ratification by minor on majority—Hypothecary action.

See TUTOR AND MINOR, 4.

24. How affected by subsequent Assessment Act—Halifax Assessment Act, 1883—46 V. c. 28, N. S.—Sale of mortgaged land for taxes—Lien—Construction of Act.

See ASSESSMENT AND TAXES, 19.

LIEN, 7.

25. Of railway property—Conveyance in trust—Liability of trustee—Unpaid vendor of rolling stock—Privilege.

See RAILWAYS AND RAILWAY COMPANIES, 55.

Mortgage—Continued.

26. Rate of interest on—Fixed time for payment of principal—
 “Until principal and interest shall be fully paid and
 satisfied.”

See INTEREST, 7.

27. *Mortgagor and mortgagee—Mortgage by trustee—Personal liability—Right of mortgagee to enforce equities between trustee and cestui que trust.*

Where lands held in trust are mortgaged by the trustee, the mortgagee is not entitled to the benefit of any equities and rights arising either under express contract or upon equitable principles, entitling the trustee to indemnity from his *cestui que trust*. Fournier and Taschereau, JJ., dissenting.

Williams v. Balfour.—xviii. 472.

28. *Creation of tenancy by mortgage—Demise to mortgagor—Construction of—Rent reserved—Intention to create tenancy.*

A mortgage of real estate provided that the money secured thereby, \$20,000, should be payable with interest at 7 per cent. per annum as follows: \$500 on December 1st, 1883; \$500 on the first days of June and December in each of the four following years; and \$15,500 on June 1st, 1888; and it contained the following provision: “And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction. And it is agreed that such payments when so made shall respectively be taken, and be in all respects in satisfaction of the moneys so then payable according to the said proviso.” The mortgage did not contain the statutory distress clause, or clause providing for possession by the mortgagor until default and it was not executed by the mortgagees. The mortgagor was in possession of part of the premises and his tenants of the remainder, and such possession continued after the mortgage was executed. The goods of the mortgagor having been seized under execution the mortgagees claimed payment of a year’s rent under the Statute of Anne.

Held, *per Strong, Gwynne and Patterson, JJ., Ritchie, C.J., and Taschereau, J.*, dissenting, that the mortgage deed failed to create between the mortgagor and mortgagees the relation of landlord and tenant, so as to give the mortgagees the right to distrain for arrears of rent, under the provisions of 8 Anne, c. 14, as against an execution creditor of the mortgagor; because, even if the deed could operate as a lease although not signed by the mortgagees, the rent reserved was so unreasonable and excessive as to show conclusively that the parties could not have intended to create a tenancy and that the arrangement was unreal and fictitious.

Mortgage—Continued.

The right to impugn the validity of a lease between a mortgagor and mortgagees on the ground that it is merely fictitious and colourable is not to be confined to any particular class such as assignees in bankruptcy, but may be exercised wherever the interests of third parties may be involved.

Per Strong, J.—The execution of the deed by the mortgagor estopped him from disputing the tenancy, and the mortgagees were also estopped by their acceptance of the mortgagor as their tenant, evidenced by their accepting the deed, advancing their money upon the faith of it and permitting the mortgagor to remain in possession. The mortgage deed, although executed by the mortgagor only, operated in any event to create a tenancy at will, at the same rental as that expressly reserved by the demise clause. S. 3 of 8 & 9 V. c. 106 (R. S. O. c. 100, s. 8), has not the effect of repealing the words of the Statute of Frauds which make the lease required by that statute to be in writing signed by the lessor so far effectual as to create a tenancy at will.

Per Gwynne and Patterson, JJ.—The mortgage deed not having been signed by the mortgagees failed to create even a tenancy at will.

Per Gwynne, J.—The form adopted for the demise clause is such that by the mortgagees executing the deed it would operate as a lease, and by their not executing it the clause would be simply inoperative.

Per Ritchie, C.J., and Taschereau, J.—The execution of the mortgage by the mortgagor and continuing in possession under it amounted to an attornment and the relation of landlord and tenant was created. The deed was intended to operate as an immediate lease with intent to give the mortgagees an additional remedy by distress and was a *bona fide* contract for securing the payment of principal and interest, and in the absence of any bankruptcy or insolvency laws there was nothing to prevent the parties from making such a contract.

Hobbs v. Ontario Loan & Debenture Co.—xviii. 483.

29. Non-registration of—Priority of subsequent mortgage—Sale under—Bar of dower.

Certain land was devised to the testator's sons charged with an annuity to his widow who also had her dower therein. The devisees mortgaged the land to C. in March, 1879, and the mortgage was not registered until January, 1880. In November, 1879, a second mortgage was given to M. and registered the same month. In this mortgage the widow joined barring her dower and releasing her annuity for the benefit of M. She had had knowledge of the prior mortgage when it was made and had refused to join in it. The second mortgagee, not being aware, when his mortgage was executed, of the prior incumbrance, gained priority, and the land was sold to satisfy his mortgage: the proceeds of the sale being more than sufficient for that purpose the surplus was claimed by both the widow and by C.

Held, reversing the judgment of the Court of Appeal for Ontario, Gwynne and Patterson, JJ., dissenting, that the security for which the dower had been barred and the annuity released having been satisfied, the widow was

Mortgage—Continued.

entitled to the fund in the court as representing her interest in the land in priority to C.

Gray v. Coughlin.—xviii. 553.

30. Fire insurance—Insurance by mortgagee under provision in mortgage—Payment to mortgagee—Subrogation.

See INSURANCE, FIRE, 28.

31. Promissory notes for balance of purchase money—Failure of vendor—Additional payment to obtain release from mortgage—Agreement that parties should be in same position as if sale not made—Failure of consideration for notes.

See TRANSACTION, 2.

32. *Deed absolute in form intended to operate as mortgage—Intention—Character of evidence of.*

To induce a court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only the evidence of such intention must be of the clearest, most conclusive and unquestionable character.

McMicken v. The Ontario Bank.—xx. 548.

33. Preference by—Pressure—R. S. O. (1887), c. 124, s. 2.

See ASSIGNMENT, 24.

34. Agreement to give mortgage—Omission to include lands in mortgage by mistake—Suit for rectification—Registered judgment against lands not included in mortgage—Priority of—Registry Act, R. S. (N. S.), 5th series, c. 84, s. 21.

See REGISTRATION, 8.

35. Mill property—Dealt with by instrument in form of chattel mortgage—Sufficiency of in Equity—Omission of property by mistake—Rectification—Sale under power of sale in mortgage—Defence of purchase for value without notice.

See VENDOR AND PURCHASER, 4.

36. *Mortgagor and mortgagee—Foreclosure of mortgage—Practice—Addition of parties—Lessee of mortgagor—Protection of interest of—Staying proceedings—Order of sale of mortgaged lands.*

In an action for foreclosure of mortgage defendants were the administrators and heirs at law of the mortgagor and certain devisees in trust of deceased heirs. Subsequent incumbrancers, judgment creditors of some of the heirs, and the lessee of the Queen Hotel, part of the mortgaged property, under lease

Mortgage—Continued.

from some of the heirs, were not made parties. None of the defendants appeared and the equity of redemption of the mortgagor and those claiming under him was barred and foreclosed, and the lands ordered to be sold on a day named. On that day, on application of the lessee of the Queen Hotel, an *ex parte* order was made by the Chief Justice of the Supreme Court of Nova Scotia directing that on payment into court of \$37,019 by S. & K., further proceedings by plaintiff should be stayed until further order and that plaintiffs should convey the mortgaged lands and the suit and benefit of proceedings therein to S. & K., which direction was complied with.

On December 26th, 1889, defendants moved to rescind this order. The motion was refused and the order amended by a direction that the lessee should be made a defendant to the action and S. & K. joined as plaintiffs, and that the stay of proceedings be removed. On January 4th, 1890, a further order was made directing that the Queen Hotel property be sold subject to the rights of the lessee. From the two last mentioned orders defendants appealed to the full court which affirmed that of December 26th and set aside that of January 4th. Both parties appealed to this court.

Held, that the order of 26th December, 1889, was rightly affirmed. The stay of proceedings under the order affirmed by it was no more objectionable than if effected by injunction to stay a sale under a writ of *fi fa*, and being made at the instance of a lessee, and as such a purchaser *pro tanto*, of the mortgaged lands who had a right to redeem it was in the discretion of the Chief Justice so to order. To the direction that plaintiffs should convey the lands to S. & K. defendants had no *locus standi* to object, and they were not prejudiced by the addition of parties made by the order. Nor had defendants a right to object to the removal of the stay of proceedings and any right subsequent incumbrancers not before the court might have to complain would not be affected by the order made in their absence. Moreover, between the date of the order and the appeal to the full court the property having been sold under the decree the purchaser not being before the court was a sufficient ground for dismissing the appeal.

Held, further, that the order of January 4th, 1890, should also have been affirmed by the full court. In selling the mortgaged property the court had a right to endeavour to preserve the rights of the lessee by selling first the portions in which she had no interest.

Collins v. Cunningham. }
Cunningham v. Drysdale. } —xxi. 139.

37. Of railway bonds as security for advances—Purchase by second mortgagee—Trust—Hypothecation of bonds to bank
See RAILWAYS AND RAILWAY COMPANIES, 72.

Mortmain—Statutes of—Not in force in New Brunswick.
See WILL, 6.

Municipal Acts—Relating to original road allowance.
See HIGHWAY.

Municipal Corporation—Power to raise level of streets.*See CORPORATIONS, 18.***2. Liability of, for non-repair of streets.***See CORPORATIONS, 18.***3. Liability of, for defective bridge.***See CORPORATIONS, 18.***4. Agreement with company—To discontinue use of traction engine—Steam engine included in—***See AGREEMENT, 18.***5. Municipality—Drainage in—Petition for—Extending into adjoining Municipality—Report of Engineer—Not defining proposed termini—Benefit to lands in adjoining Municipality—Assessment on adjoining Municipality.**

Under the drainage clauses of the Municipal Act a by-law was passed by the township of Chatham founded on the report, plans and specifications of a surveyor, made with a view to the drainage of certain lands in that township. The by-law, after setting out the fact of a petition for such work having been signed by a majority of the ratepayers of the township to be benefited by the work, recited the report of the surveyor, by which it appeared that in order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham, for part of the cost as for benefit to be derived by the said lots and roads therefor. The township of Dover appealed from this report, under s. 582 of 46 V. c. 18, on the grounds, *inter alia*, that a majority of the owners of property to be benefited by the proposed drainage works had not petitioned for the construction of such work as required by the statute; that no proper reports, plans, specifications, assessments and estimates of said proposed work had been made and served as required by law; that the council of Chatham, or the surveyor, had no power to assess or charge the lands in Dover for the purposes stated in the said report and by-law; and that the report did not specify any facts to show that the council of Chatham, or their surveyor, had any authority to assess the lots or roads in Dover for any part of the cost of the proposed work; that the assessment upon lots and roads in Dover was much too high in proportion to any benefit to be derived from the proposed work and that no assessment whatever should be made on the lands or roads in Dover as the work would, in fact, be an injury thereto; and that the report did not sufficiently specify the beginning and end of the work, nor the manner in which Dover was to be benefited.

Three arbitrators were appointed under the provisions of the Act, and at their last meeting they all agreed that the Township of Dover would be benefited by the work, but R. F., one of the arbitrators, thought \$500 should be taken off the town line, and W. D., another of the arbitrators, held that while

Municipal Corporation—Continued.

the bulk sum assessed was not too great the assessment on the respective lands and roads and parts thereof should be varied, but that this was a matter for the Court of Revision. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award "if in accordance with the above memoranda." Later, on the same day, W. D. and A. E. met and signed an award determining that the assessment on the lands and roads in Dover, and on the town line made by the surveyor should be sustained and confirmed; that the appeal should be dismissed, and that the several grounds mentioned in the notice of appeal had not been sustained.

The Queen's Bench Division set aside this award on two grounds, namely, want of concurring minds in the arbitrators, and of defect in the surveyor's report in not showing specifically the beginning and end of the work. 5 O. R. 825. The judgment of the Queen's Bench Division was sustained by the Court of Appeal. 11 Ont. App. R. 248. On appeal to the Supreme Court of Canada:

Held, Ritchie, C.J., dissenting, that the award should have been set aside upon the ground that it was not shown that a petition for the proposed work was signed by a majority of the owners of the property to be benefited thereby, so as to give the corporation of Chatham jurisdiction to enter the township of Dover and do any work therein.

That the arbitrators should have adjudicated upon the merits of the appeal against the several assessments on the lots and roads assessed, as their award was, by ss. 400 & 404 of 46 V. c. 18, made final, subject to appeal only to the High Court of Judicature, and that it was not a matter for the Court of Revision to deal with at all, as held by one of the arbitrators.

That the award should have been set aside because it did, in point of fact, as it stood, profess to be a final adjudication against the township of Dover upon all the grounds of appeal stated in the notice of appeal, and did, in point of fact, charge every one of the lots and roads so assessed with the precise amount assessed upon them respectively, although, by a minute of the proceedings of the arbitrators who signed the award, it appeared that they refused to render any award upon such point and expressed their intention to be to submit that to the Court of Revision.

That the arbitrators should have allowed the appeal to them against the surveyors assessment, and that their award should have been set aside on the merits, because the evidence not only failed to show any benefit which the lots or roads in Dover which were assessed would receive from the proposed work, but the evidence of the surveyor himself showed that he did not assess them for any benefit the work would confer upon them, but for reasons of his own, which were not sufficient under the statute, and did not warrant them to be assessed.

The Corporation of the Township of Chatham and North Gore v. The Corporation of the Township of Dover East and West.

—April 9, 1886.—xii. 321.

Municipal Corporation—Continued.

6. *Construction of subway by—Authorized by special statute—46 V. c. 45 (O.)—Agreement with Railway Companies—Order in Council under 46 V. c. 24 (D.)—Work done as agents of companies or as principal—Injury to property by construction of subway—Corporation a wrongdoer.*

A special statute in Ontario, 46 V. c. 45, authorized the municipalities of the city of Toronto and the village of Parkdale, jointly or separately, and the railway companies whose lines of railway ran into the city of Toronto, to agree together for the construction of railway subways; provision was made in the Act for the issue of debentures to provide for the cost of the work, and the by-law for the issue of such debentures was not required to be submitted to the ratepayers; there was also provision for compensation to the owners of property injuriously affected by such work, such compensation to be determined by arbitration under the Municipal Act if not mutually agreed upon. The municipalities not being able to agree, Parkdale and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on the application of Parkdale and the railway companies to the Privy Council of Canada, purporting to be made under 46 V. c. 24 (D.), an order of the Privy Council was obtained authorizing the work to be done according to the terms of such agreement. The municipality of Parkdale then contracted with one G. for the construction of the subway, and a by-law providing for the raising of Parkdale's share of the cost of construction was submitted to, and approved of, by the ratepayers of that municipality. In an action by the owner of property injured by the work:

Held, per Ritchie, C.J., Fournier and Henry, JJ., that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and the municipality was therefore liable as a wrongdoer.

Per Gwynne, J.—That the work should be considered as having been done under the special Act, and the plaintiffs were entitled to compensation thereunder.

Per Taschereau, J.—That the work was done by the municipality as agent of the railway companies and it was therefore not liable.

West v. Parkdale.—xiii: 250.

[On appeal to the Privy Council the judgment of the Supreme Court was affirmed. 12 App. Cases, 602.]

7. *By-law—36 V. c. 48 (O.)—Bonus to railway—Vote of ratepayers on by-law for—Premature consideration of by-law—Error in copy submitted to ratepayers—Signing and sealing by-law—To be passed by same council.*

A by-law was submitted to the council of the city of O., under 36 V. c. 48, for the purpose of granting a bonus to a railway then in course of construction, and after consideration by the council it was ordered to be submitted to the ratepayers for their vote. By the notice published in accordance with the

Municipal Corporation—Continued.

provisions of the statute such by-law was to be taken into consideration by the council after one month from its first publication on the 24th of September, 1878. The vote of the ratepayers was in favour of the by-law, and on 20th October a motion was made in the council that it be read a second and third time, which was carried, and the by-law passed. The mayor of the council, however, refused to sign it, on the ground that its consideration was premature; and on 5th November the same motion was made and the by-law was rejected. Nothing more was done in the matter until April, 1874, when a motion was again made before the council that such by-law be read a second and third time, which motion was, on this occasion, carried. At this meeting a copy only of the by-law was before the council, the original having been mislaid and it was not found until after the commencement of this suit. When it was found it was discovered that the copy voted on by the ratepayers contained, by mistake of the printers, a date for the by-law to come into operation different from that of the original. In 1888 an action was brought against the corporation of the city of O., for the delivery of the debentures provided for by the by-law, in which suit the question of the validity of the whole proceedings was raised.

Held, affirming the judgment of the court below: 1. That the vote of 20th November, 1873, was premature, and not in conformity with the provisions of s. 231 of the Municipal Act; that the mayor properly refused to sign it, and that without such signature the by-law was invalid under s. 226. 2. That the council had power to consider the by-law on 5th November, 1873, and the matter was then disposed of. 3. That the proceedings of 7th April, 1874, were void for two reasons: One, that the by-law was not considered by the council to which it was first submitted as provided by s. 236, which is to be construed as meaning the council elected for the year and not the same corporation; and the other reason is, that the by-law passed in 1874 was not the same as that submitted, there being a difference in the dates.

Semble that the functions of a municipality in considering a by-law after it has been voted on by the ratepayers are not ministerial only, but the by-law can be confirmed or rejected irrespective of the favourable vote.

Canada Atlantic Railway Co. v. Corporation of the City of Ottawa.
—xii. 365.

[The Privy Council granted leave to appeal in this case, but the appeal was not prosecuted to a termination.]

8. *Negligence—Management of ferry—Manner of mooring—Contract to carry—Ferry under control of corporation—Liability of corporation for injury to passenger—Contributory negligence.*

The ticket issued to M., a traveller by rail from Boston, Mass., to St. John, N. B., entitled him to cross the St. John harbour by ferry, and a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corporation of St. John.

Municipal Corporation—*Continued.*

Held, that an action would lie against the corporation for injuries to M. caused by the negligence of the officers of the boat during the passage.

The approaches of the ferry to the wharf were guarded by a chain extending from side to side of the boat at a distance of about one and a half feet from the end. On approaching the wharf the man whose duty it was to moor the boat unloosed the chain at one side, and when near enough jumped on the floats to bring the mooring chain aboard. A number of the passengers rushed towards the floats and M. seeing the chain down and thinking it safe to land followed them and fell through the space between the wharf and the boat and was injured. When this happened the boat was not moored.

Held, affirming the judgment of the court below, that the corporation of the city were liable to M. for the injuries sustained by the negligent manner of mooring the boat, and that he was not guilty of such contributory negligence as would avoid that liability.

The Mayor, etc., of St. John v. McDonald.—xiv. 1.

9. Militia Act—Disturbance anticipated or likely to occur—Calling out militia—Action against municipality for expenses.

See MILITIA ACT.

10. *Negligence—Public highway—Construction of crossing—Elevation above level of street.*

A municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and that a sidewalk is at an elevation of four inches above the level of the crossing is not such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger sustained by striking her foot against the curbing while attempting to cross the street. *Strong and Fournier, JJ.*, dissenting.

The Corporation of the City of London v. Goldsmith.—xvi. 231.

11. Aid to railway—Debentures signed by warden *de facto*—Evidence of right to—Completion of railway—Onus of proof of.

See RAILWAYS AND RAILWAY COMPANIES, 52.

12. Road allowance—Obligation of municipality as to opening—Substitution of new road in lieu of original road allowance—Jurisdiction of court over municipality—C. S. U. C. c. 54—R. S. O. (1887) c. 184, ss. 524, 531.

See HIGHWAY, 4.

13. Inquiry into civic affairs—County Court judge—Functions of, in making inquiry—Control of, by court.

See PROHIBITION, 7.

Municipal Corporation—Continued.

14. *Appointment of board of health—R. S. N. S. 4th ser. c. 29-37 V. c. 6, s. 1 (N.S.)—42 V. c. 1, s. 67 (N.S.)—Employment of physician—Reasonable expenses—Construction of contract—Attendance upon small-pox patients for the season—Dismissal—Form of remedy—Mandamus.*

Section 67 of the Act by which municipal corporations were established in Nova Scotia (42 V. c. 1) giving them "the appointment of health officers * * and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S. 4th ser., providing for the appointment of boards of health by the Lieutenant-Governor in Council. Ritchie, C.J., doubting the authority of the Lieutenant-Governor to appoint in incorporated counties.

A board of health, appointed by the executive council, by resolution, employed M., a physician, to attend upon small-pox patients in the district "for the season" at a fixed rate of remuneration per day. Complaint having been made of the manner in which M.'s duties were performed he was notified that another medical man had been employed as a consulting physician, but refusing to consult with the new appointee he was dismissed from his employment. He brought an action against the municipality setting forth in his statement of claim the facts of his engagement and dismissal and claiming payment for his services up to the date at which the last small-pox patient was cured and special damages for loss of reputation by the dismissal. The Act (R. S. N. S. 4th ser. c. 29, s. 12), allows the board of health to incur reasonable expenses, which are defined by (37 V. [N.S.] c. 6, s. 1) to be services performed and bestowed and medicine supplied by the physicians in carrying out its provisions and makes such expenses a district, city or county charge to be assessed by the justices and levied as ordinary county rates.

Held, *Per* Fournier, Gwynne and Taschereau, J.J., affirming the judgment of the court below, that the contract with M. was to pay him \$6.50 per day so long as small-pox should prevail in the district during the season; that his dismissal was wrongful and the fulfilment of the contract could be enforced against the municipality by action.

Per Ritchie, C.J., and Strong, J. There was sufficient ground for the dismissal of M. Assuming, however, his dismissal to have been unjustifiable, M.'s only remedy would have been by mandamus to compel the municipality to make an assessment to cover the expense incurred. But the claim being really one for damages for wrongful dismissal it did not come within the "reasonable expenses," which may be incurred by a board of health and made a charge on the county, and the municipality was, therefore, not liable.

Per Patterson, J. That the proper remedy for the recovery of the expenses mentioned in said s. 12 is by action and not by mandamus to compel an assessment, but a claim for damages for wrongful dismissal does not come within the section and is not made a county charge.

Municipality of the County of Cape Breton v. McKay.—xviii. 639.

Municipal Corporation—Continued.**15. Statutory powers—Control over streets—Alteration of grade—Negligence—Contributory negligence—34 V. c. 11 (N.B.)—45 V. c. 61 (N.B.).**

The Act of Incorporation of the town of Portland, 34 V. c. 11 (N.B.), which remained in force when the town was incorporated as a city by 45 V. c. 61 (N.B.), empowered the corporation to open, lay out, regulate, repair, amend and clean the roads, streets, etc.

Held, that the corporation had authority, under this Act, to alter the level of a street if the public convenience required it.

W. was owner and occupant of a house in Portland situate several feet back from the street with steps in front. The corporation caused the street in front of the house to be cut down, in doing which the steps were removed and the house left some six feet above the road. To get down to the street W. placed two small planks from a platform in front of the house and his wife in going down these planks in the necessary course of her daily avocations slipped and fell receiving severe injuries. She had used the planks before and knew that it was dangerous to walk up or down them. In an action against the city in consequence of the injuries so received :

Held, affirming the judgment of the Supreme Court of New Brunswick, that the corporation having authority to do the work, and it not being shown that it was negligently or improperly done, the city was not liable.

Held, also, that the wife of W. was guilty of contributory negligence in using the planks as she did knowing that such use was dangerous.

Williams v. The City of Portland.—xix. 159.

16. Constitutional law—B. N. A. Act, ss. 91 & 92—Interest—Legislative authority over—Municipal Act—49 V. c. 53, s. 626; 50 V. c. 10, s. 43 (Man.)—Taxation—Penalty for not paying taxes—Additional rate.

The Municipal Act of Manitoba provides that persons paying taxes before December 1st in cities, and December 31st in rural municipalities shall be allowed 10 per cent. discount; that from that date until March 1st the taxes shall be payable at par; and after March 1st, 10 per cent. on the original amount of the tax shall be added.

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that the 10 per cent. added on March 1st was only an additional rate or tax imposed as a penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of s. 91 of the B. N. A. Act. *Ross v. Torrance*, 2 Legal News, 186, overruled.

Lynch v. The Can. N. W. Land Co., South Dufferin v. Morden, Gibbins v. Barber.—xix. 204.

Municipal Corporation—Continued.**17. Corporation—Contract of—Seal—Performance—Adoption—Municipality—By-law—Manitoba Municipal Act, 1884, s. 111.**

A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. Ritchie, C.J., and Strong, J., dissenting.

In s. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. Ritchie, C.J., and Strong, J., dissenting.

Bernardin v. The Municipality of North Dufferin.—xix. 581.

See MUNICIPAL CORPORATION, 28.

18. Construction of sewer—Right to enter lands of adjoining municipality—Restrictions—R. S. O. 1887, c. 184, s. 479, s-s. 15. 51 V. c. 28, s. 20. (O.).

50 V. c. 28, s. 20, amending the Municipal Act of Ont. R. S. O. 1887, c. 184, s. 479, does not take away the restrictions imposed by the Municipal Act, and it is still necessary that the two municipalities interested should settle by agreement the terms and conditions of entry for construction of sewer from one municipality into the territory of the adjoining municipality, and if such agreement cannot be had the terms and conditions must be settled by arbitration. The judgments of the Court of Appeal for Ontario (17 Ont. App. R. 346) and the Divisional Court (18 O. R. 199) affirmed.

City of Hamilton v. Corporation of Township of Barton.—xx. 173.

19. By law of, imposing tax on Telephone and Gas Companies—Action to set aside—Jurisdiction—S. & E. C. Act, R. S. C. 135, s. 24, (g).

See JURISDICTION, 93.

20. Duty to light streets—Liability for negligence—Obstruction on sidewalk—Position of hydrant.

L. was walking along the sidewalk of a street in Halifax at night when an electric lamp went out and in the darkness she fell over a hydrant and was injured. In an action against the city for damages it was shown that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on said street. The statutes respecting the government of the city do not oblige the council to keep the streets lighted but authorize them to enter into contracts for that purpose. At the time of this accident the city was lighted by electricity by a company who had contracted with the corpora-

Municipal Corporation—Continued.

tion therefor. Evidence was given to show that it was not possible to prevent a single lamp or a batch of lamps going out at times.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Strong and Taschereau, JJ., dissenting, that the city was not liable; that the corporation being under no statutory duty to light the streets the relation between it and the contractors was not that of master and servant, or principal and agent, but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that neither the position of the hydrant nor the flickering and going out of the light was in itself evidence of negligence in the corporation and that L. could have avoided the accident by the exercise of reasonable care.

The City of Halifax v. Lordly.—xx. 505.

21. *Improvement or alteration of street—Lowering grade—Injury to adjacent land—Remedy—Action—Compensation under statutory provisions—By-law—51 V. c. 42, s. 190 (B.C.).*

The Act incorporating the city of New Westminster, 51 V. c. 42 (B.C.), by s. 190, empowers the council of the city to order by by-law the opening or extending of streets, etc., and for such purposes to acquire and use any land within the city limits, either by private contract or by complying with the formalities prescribed in sub-sections 3 and 4 of the said section, which provide for the appointment of commissioners to fix the price to be paid for such land; sub-section 13 provides for the confirmation of the appointment and 15 for the deposit in court of said price by the council which deposit should vest in them the title to said land.

Sub-section 17 of section 190 enacts that sub-sections 3 and 4 shall apply to cases of damage to real or personal estate by reason of any alteration made by order of council in the line or level of any street, and for payment of the compensation therefor without further formality.

The council was authorized by by-law to raise money for improving certain streets but no by-law was passed expressly ordering such improvements. In one of the streets named in said by-law the grade was lowered, in doing which the approach to and from an adjacent lot became very difficult and no retaining wall having been built the soil of said lot caved and sunk thereby weakening the supports of the buildings thereon.

Held, affirming the decision of the court below, Ritchie, C.J., and Taschereau, J., dissenting, that the owner of said lot could maintain an action for the damage sustained by lowering the grade of the street and was not obliged to seek redress under the statute; that sub-section 17 of section 190 which dispenses with formalities required by prior sub-sections only applies to cases where land is injuriously affected by access thereto being interfered with, and where land is taken or used for the purposes of work on the streets the corporation must comply with the formalities prescribed by sub-sections 3 and 4; that the street having been excavated to a depth which caused a subsidence of adjoining land the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the statute; not having so acquired it, and having neglected to take

Municipal Corporation—Continued.

steps to prevent the subsidence of the adjacent land, they were liable for the damage thereby caused.

Held, further, that the neglect to take such precautions was in itself, however legal the making of the excavation may have been if skilfully executed, such negligence in the manner of executing it as to entitle the owner of the adjacent land to recover damages for the injury sustained.

Held, *per* Patterson, J., that in the absence of the statutory preliminaries a municipality has no greater right than any other owner of adjacent land to disturb the soil of a private person.

The Corporation of the City of New Westminster v. Brighthouse.—xx. 520.

22. Maintenance of county buildings—Establishment of county court house and jail—Right to remove from shire town.

By R. S. N. S. 5th Ser. c. 20, s. 1. as amended by 49 V. c. 11, "county or district jails, court-houses and sessions houses may be established erected and repaired by order of the municipal councils in the respective municipalities." In 1891 an Act was passed empowering the municipality of Lunenburg to to borrow a sum not exceeding \$20,000 "for the purpose of erecting and furnishing a court-house and jail for the county of Lunenburg or repairing and improving the present court-house in said county," provision being made for the municipality of Chester and the town of Lunenburg (separate corporations in said county) respectively contributing toward payment of said loan.

The town of L. is the shire town of said county where the sittings of the Supreme Court are held as required by statute, and where the county court-house and jail had always been situated. In pursuance of the above authority to borrow, the council of the municipality, by resolution, proposed to build a court-house and jail at B. another town in the county, intending after they were built to petition the legislature to transfer the sittings of the Supreme Court to B. The corporation of L. caused an injunction to be applied for and obtained restraining the municipal council from erecting a court-house and jail, for the general purposes of the county, at B. or expending in such erection any funds in which the municipality of C. or the town of L. or either of them, are interested. On appeal from the judgment granting such injunction:

Held, that the municipality could not, under the statutory authority to establish and erect a court-house and jail, remove these buildings from the town of L. and so repeal and annul the statutes of the legislature which had established them in L. Without direct legislative authority therefor the county buildings could only be erected in the shire town. The injunction was, therefore, properly granted.

Municipality of Lunenburg v. The Attorney-General of Nova Scotia.
—xx. 596.

23. Municipal by-law — Voting on — Casting vote of returning officer—R. S. O. 1887, c. 174, ss. 152, 299.

Section 299 of c. 174 of the R. S. O. 1887, provides that in case of a vote being taken on a municipal by-law, the proceedings at the poll and for and

Municipal Corporation—Continued.

incidental to the same and the purposes thereof shall be the same, as nearly as may be, as at municipal elections, and all the provisions of sections 116 to 169 inclusive of the Act so far as the same are applicable, and except so far as is therein otherwise provided shall apply to the taking of votes at such poll and to all matters incidental thereto.

And section 152, one of the sections relating to municipal elections so made applicable to the voting on a by-law, provides that "In case it appears upon the casting up of the votes as aforesaid, that two or more candidates have an equal number of votes the clerk of the municipality, whether otherwise qualified or not, shall at the time he declares the result of the poll, give a vote for one or more of such candidates so as to decide the election."

Held, affirming the judgment of the Court of Appeal for Ontario (14 Ont. App. R. 299), that this section 152 is not applicable to the case of a vote on a by-law, and the returning officer in case of a tie on such voting cannot give his vote in favour of the by-law.

Present—Ritchie, C.J., and Strong, Fournier, Taschereau and Gwynne, JJ.

The Canada Atlantic Ry. Co. v. The Township of Cambridge.—

24 L. C. J. 499.—14th June, 1888.

[The Privy Council granted leave to appeal in this case, but the appeal was not prosecuted to a termination.]

24. Ont. Municipal Act, ss. 535 (2), 538—Bridges over rivers crossing boundary lines—Deviation of boundary road—Liability of counties to repair bridges in—42 V. c. 47, (O.), effect of as to the Townships of Verulam and Harvey—Territorial Act, R. S. O. c. 5—Township fronting on lake.

An action brought by the corporation of the County of Victoria against the corporation of the County of Peterborough to compel the latter corporation to contribute to the maintenance and repair of certain bridges.

The facts will be found fully set out in the reports of the case in 15 O. R. 446, and 15 O. App. R. 617.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the Court of Appeal for Ontario, that the appeal should be dismissed.

Per Strong, J. The appeal must be dismissed for the reasons stated by Mr. Justice Osler in the Court of Appeals.

Per Patterson, J., Taschereau, J., concurring: I agree with the Court of Appeal that the rivers over which the bridges in question are built do not cross any road between the counties of Victoria and Peterborough and that the provision of s. 535 cannot aid the claim of the county of Victoria, because no road existing in law between the counties at the place in question there is no such deviation of a road. The bridges, if made where the rivers called the Big Bob and the Little Bob cross the original allowance, could not be said, since March, 1880, to be over rivers crossing the boundary line between the townships. *A fortiori* the bridge on the deflected road cannot be held to be over a river crossing the boundary line.

Municipal Corporation—Continued.

Per Gwynne, J. The bridge in question is one across the stream flowing from Sturgeon Lake into Pigeon Lake at a point distant over $1\frac{1}{2}$ miles west of Pigeon Lake and in the village of Bobcaygeon, which is a village situate within the Township of Verulam, so that it is apparent: 1. That this is not a bridge over a river forming or crossing any boundary line between two municipalities, so as to come within s. 535; and 2. As there is no river which in point of fact does cross the boundary line between the two townships at any place, no question of deviation within the meaning of the section does or can arise. The bridge is one across a river wholly within the limits of the village of Bobcaygeon, and which is said to exceed 100 feet in width. The bridge, therefore, seems to come within the provisions of s. 534 of the Act. It certainly does not come within s. 535.

Present.—Strong, Fournier, Taschereau, Gwynne, and Patterson, JJ.

The Corporation of the County of Victoria v. The Corporation of the County of Peterborough.—14th June, 1889.

25. Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Defence not pleaded—34 V. c. 11, (N.B.)—25 V. c. 16, (N.B.).

The Act incorporating the town of Portland, 34 V. c. 11 (N.B.), gives the town council the exclusive management of and control over the streets, and power to pass by-laws for making, repairing, etc., the same. By s. 84 the provisions of 25 V. c. 16 and amending Acts, relating to highways, apply to said town and the powers, authorities, rights, privileges and immunities vested in commissioners and surveyors of roads in said town are declared to be vested in the council. By another Act no action could be brought against a commissioner of roads unless within three months after the act committed, and on one month's previous notice in writing. The town of Portland afterwards became the city of Portland, remaining subject to the said provisions, and eventually a part of the city of St. John.

An action was brought against the city of Portland by C. for injuries sustained by stepping on a rotten plank on a side-walk in said city and breaking his leg. More than a month before the action was commenced plaintiff's solicitor wrote to the council notifying them of the injuries sustained by plaintiff, and concluding: "As it is Mr. Christie's intention to claim damages from you for such injuries, I give you this notice that a prompt inquiry into the circumstances may be made and such damages paid as Mr. Christie is entitled to:" except this no notice of action was given, but want of notice was not pleaded. The jury on the trial found that the broken plank was within the line of the street, and that the council, by conduct, had invited the public to use said sidewalk. After Portland became a part of St. John the latter city became defendant in the case for subsequent proceedings.

Held, Strong, J., dissenting, that the city was liable to C. for the injuries so sustained.

Held, *per* Ritchie, C.J., and Strong, J., that the letter of the solicitor was not a sufficient notice of action under the statute.

Municipal Corporation—Continued.

Per Ritchie, C.J. If notice of action was necessary the want of it could not be relied on as a defence without being pleaded.

Per Taschereau, Gwynne and Patterson, JJ. Notice was not necessary; the liability of the city did not depend on s. 84 of 84 V. c. 11, but on the sections making it the duty of the council to keep the streets in repair; and the only privilege or immunity possessed by the commissioners and surveyors of roads was that of exemption from the performance of statute labour.

Per Strong, J. One of the "immunities" declared to be vested in the council was that of not being subject to an action without prior notice, and no notice having been given in this case C. could not recover.

City of St. John v. Christie.—xxi. 1.

26. Drainage of lands—Injury to other lands by—Remedy for— Arbitration—Notice of action—Mandamus.

By s. 483 of the Ontario Municipal Act, R. S. O. [1887] c. 184, if private lands are injuriously affected by the exercise of municipal powers the council shall make due compensation to the owner, the claim for which, if not mutually agreed upon, shall be determined by arbitration.

Held, reversing the judgment of the Court of Appeal, that it is only when the act causing the injury can be justified as the exercise of a statutory power that the party injured must seek his remedy in the mode provided by the statute; if the right infringed is a common law right and not one created by the statute, remedy by action is not taken away.

By s. 569 of the same Act the council, on petition of the owners for drainage of property, may procure an engineer or surveyor to survey the locality and make a plan of the work, and if of opinion that the proposed work is desirable may pass by-laws for having it done.

Held, reversing the judgment of the Court of Appeal, that the council has a discretion to exercise in regard to the adoption, rejection or modification of the scheme proposed by the engineer or surveyor and if adopted the council is not relieved from liability for injuries caused by any defect therein or in the construction of the work or from the necessity to provide a proper outlet for the drain when made thereunder.

The Act imposes upon the council, after the construction of work proposed by the engineer or surveyor, the duty to preserve, maintain and keep in repair the same. The township of R., in pursuance of a petition for draining flooded lands and surveyor's report, constructed a number of drains and embankment. These drains were led into others formerly in use which had not the capacity to carry off the additional volume of water, but became overcharged and flooded the land of W. adjoining.

Held, that the municipality was guilty of neglect of the duty imposed by the Act, and W. had a right of action for the damage caused to his land thereby.

Held, *per Strong and Gwynne, JJ., Ritchie, C.J., and Patterson, J., contra*, that the drain causing the injury being wholly within the limits of the municipality in which it was commenced, and not benefiting the lands in an adjoining

Municipal Corporation—Continued.

municipality it did not come under the provisions of s. 583 of the Municipal Act and W. was not entitled to a *mandamus* under that section.

Per Ritchie, C.J., and Patterson, J., s. 583 applied to the said drain, but W. could not claim a *mandamus* for want of the notice required thereby.

Per Strong and Gwynne, JJ., that though W. was not entitled to the statutory *mandamus* it could be granted under the Ontario Judicature Act R. S. O. (1887) c. 44.

Williams v. The Corporation of the Township of Raleigh.—xxi. 108.

27. Ontario Municipal Act—R. S. O. (1887) c. 184, s. 583—Drainage works—Non-completion—Mandamus—Maintenance and repair—Notice.

The township of C., under the provisions of the Ontario Municipal Act, R. S. O. (1887) c. 184, relating thereto, undertook the construction of a drain along the town line between the townships of C. and S., but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the lands of M. adjoining said town line. M. and the township of S. joined in an action against the township of which they alleged that the effect of the work on the said drain was to stop up the outlets to other drains in S. and cause the waters thereof to flow back and flood the roads and lands in the township, and they asked for an injunction to restrain C. from so interfering with the existing drains and a *mandamus* to compel the completion of the drain undertaken to be constructed by C. as well as damages for the injury to M.'s land and other land in S.

Held, affirming the decision of the Court of Appeal, that M. was entitled to damages, and reversing such decision, Taschereau, J., dissenting, and Patterson, J., hesitating, that the township of S. was entitled to a *mandamus*, but the original decree should be varied by striking out the direction that the work should be done at the cost of the township of C., it not being proved that the original assessment was sufficient.

Held, per Ritchie, C.J., Strong and Gwynne, JJ., that s. 583 of the Municipal Act providing for the issue of the *mandamus* to compel the making of repairs to preserve and maintain a drain does not apply to this case in which the drain was never fully made and completed, but that the township of S. was entitled to a *mandamus* under the Ontario Judicature Act, R. S. O. (1887) c. 44.

Held, further, that the flooding of lands was not an injury for which the township of S. could obtain an action for damages, even though a general nuisance was occasioned. The only pecuniary compensation to which S. was entitled was the cost of repairing and restoring roads washed away.

Per Patterson, J. It might be preferable to leave the parties to work out their remedy under s. 583.

The Corporation of the Township of Sombra v. The Corporation of the Township of Chatham.—xxi. 805.

Municipal Corporation—Continued.

28. *Contract under seal—By-law—Executory contract—Enforcement.*

In pursuance of section 480 of the Ontario Municipal Act, R. S. O. 1887, c. 184, empowering any municipal council to purchase fire apparatus, the council of the town of P. by resolution authorized the Fire and Water Committee to ascertain the price of a fire engine, and on the committee's report recommending the purchase, a contract was entered into under the corporate seal of the council for the construction of an engine and hose by the Waterous Co. No by-law of the corporation was passed authorizing or sanctioning such contract, the engine was built and placed in the town hall and a committee of the council was appointed to engage experts to test it, the test was made and the experts reported favourably upon it, but the council afterwards passed a resolution that all negotiations in reference to the purchase be dropped and that the company be notified to remove the engine from the town hall. An action was brought against the municipal corporation for the contract price of the engine and hose on the trial of which the presiding judge found as a fact that the engine had answered the test and fulfilled the requirements of the contract, but held that the contract could not be enforced for want of a by-law. This judgment was affirmed by the Divisional Court (30 O. R. 411) and by the court of appeal for Ontario (19 Ont. A. R. 47).

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the engine not having been accepted by the corporation the contract was not executed; that section 282 of the Municipal Act requires all powers of the corporation to be exercised by by-law unless otherwise expressly authorized or provided; that the authority to purchase fire apparatus is expressly given to municipal corporations by the Act and is a power to be exercised by by-law under said section and the contract being executory the want of a by-law was a bar to the action. *Bernardin v. North Dufferin*, 19 Can. S. C. R. 581, distinguished.

Held, *per* Gwynne, J. That the powers to be exercised by by-law are only legislative powers and a contract such as that in question in this case could be enforced without a by-law.

Waterous Engine Works Co. v. Town of Palmerston.—18 Dec. 1892.—xxi. 556.

29. *By-law—Submission to ratepayers—Publication in adjoining local municipality—Compliance with statute—Imperative or directory provisions—Authority to quash.*

The Ontario Municipal Act, R. S. O., 1887, c. 184, requires, by s. 293, that before the final passing of a by-law requiring the assent of the ratepayers, a copy thereof shall be published in a public newspaper either within the municipality or in the county town or published in an adjoining local municipality. A by-law of the township of South Norwich was published in the village of Norwich in the county of Oxford, which does not touch the boundaries of South Norwich but is completely surrounded by North Norwich which does touch said boundaries.

Municipal Corporation—Continued.

Held, affirming the decision of the Court of Appeal for Ontario, 19 Ont. App. R. 343, that as the village of N. was geographically within the adjoining municipality the statute was sufficiently complied with by the said publication.

This case raises also a question as to the constitutionality of what is known as the "local option Act" of Ontario, the argument on which was postponed until the validity of the by-law was settled and will be proceeded with at the May term, 1893.

Present: Strong, C.J., and Fournier, Taschereau, Gwynne and Patterson, JJ.

Huson v. South Norwich.—20th February, 1893.

30. Assessment for water rates—Discount for prompt payment—Discrimination against property exempt from taxes—R. S. O. 1887, c. 184, s. 480, s-s. 3, c. 192, ss. 19 & 20.

See ASSESSMENT AND TAXES, 28.

Mutual Insurance Companies.—Uniform Conditions Act, R. S. O. c. 162, not applicable to.

See INSURANCE, FIRE, 5.

N.

Navigation—Obstruction in navigable waters, below low water mark—Nuisance—Trespass.

E. et al. brought an action of tort against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in by them as supports to an extension of their wharf, built on certain land covered with water in said harbour of Halifax, of which they had obtained a grant from the provincial government of Nova Scotia in August, 1861. W. pleaded, *inter alia*, that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax harbour, to and from the south side of said wharf, with steamers, etc., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which *E. et al.* were making for the extension of their wharf did obstruct access by steamers and other vessels to W.'s wharf. A verdict was rendered against W., which the full court refused to set aside.

On appeal to the Supreme Court of Canada it was **Held**, reversing the judgment of the Supreme Court of Nova Scotia that, as the Crown could not, without legislative sanction, grant to *E. et al.* the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free

Navigation—Continued.

and full enjoyment of the right of navigation, and as W. had shown special injury, he was justified in removing the piles, which was the trespass complained of.

Wood v. Esson.—ix. 239.

2. Obstruction in navigable rivers.

See LEGISLATURE, 8.

3. *Impeding navigation of river—Obstructions placed for purpose of repairing bridge—Powers of Bridge Company—Negligence—Damages to raft—43 V. c. 61 (D.)—44 V. c. 51 (D.).*

The plaintiff, by his declaration in this action, in substance alleged that he was possessed of a raft of oak logs and was lawfully floating the same down the Red River, which is a navigable river, and that the defendants had unlawfully placed certain piles and obstructions in the bed of the said river and obstructed the free navigation thereof, so that the raft of the plaintiff struck against the said piles and obstructions, and thereby the said raft and the said logs composing the same were carried away, destroyed and sunk.

The defendants, by their pleas, denied that they placed said piles and obstructions in the bed of the said river, and alleged that the said raft was not the plaintiff's, and also alleged that they were a body corporate, empowered by certain Acts of the Parliament of Canada (43 V. c. 61, and 44 V. c. 51,) to erect, construct, work, maintain and manage a bridge across the Red River, and that in pursuance of said Acts they have erected such a bridge, and that before the happening of the events complained of it became necessary, for the purpose of keeping up and maintaining the said bridge, to place the said piles and obstructions, in the declaration mentioned, in the bed of said river, at and under the said bridge, and that thereupon they lawfully placed the said piles and obstructions there for the purposes aforesaid, and not otherwise, and that they used the utmost care and diligence in the placing of said piles and obstructions, so as not to interfere with the free navigation of said river, and that the said piles and obstructions did not interfere with the free navigation thereof, and that the damages complained of happened through the appellant's own negligence.

The bridge having been injured by the ice in the spring of 1882, it became necessary to repair it. The piles, etc., complained of were placed in the space where the plaintiff's raft struck, for the purpose of being used in the repairing of the bridge and rebuilding the permanent structure after its injury.

The bridge was constructed with a swing or draw, and two spaces of between eighty and ninety feet were left, one upon each side of the swing pier, as required by the Acts of incorporation. These spaces were open at the time of the injury complained of, no piles having ever been placed in them.

A verdict was found for the plaintiff. The Court of Queen's Bench for Manitoba set the verdict aside and ordered a non-suit to be entered.

On appeal to the Supreme Court of Canada, **Held**, that the defendants had not exceeded, nor been guilty of negligence, in carrying out the powers conferred upon them by their charter, and were therefore not liable.

Appeal dismissed with costs.

Rolston v. Red River Bridge Co.—12th May, 1885.

Navigation—Continued.**4. Navigation, interference with—Water lots—Crown grant—Easement—Trespass—Public navigable waters.**

W. was the lessee, under lease from the city of Toronto, of certain water lots held by the said city under patent from the Crown, granted in 1840, the lease to W. being given by authority of the said patent, and of certain public statutes respecting the construction of the Esplanade which formed the boundary of said water lots.

Held, affirming the judgment of the court below, that such lease gave to W. a right to build as he chose on the said lots, subject to any regulations which the city had power to impose, and in doing so to interfere with the right of the public to navigate the water.

Held, also, that the said waters being navigable parts of the Bay of Toronto, no private easement by prescription could be acquired therein while they remained open for navigation.

London and Canadian Loan Co. v. Warin.—xiv. 232.

5. Navigable river, access to, by riparian owner—Obstruction by railway company—Damages — Action at law—43-44 V. c. 43, s-s. 3 & 5 (P.Q.).

See RIPARIAN PROPRIETORS, 2.

Negligence—Accident—Failure to use air brakes.

See RAILWAYS AND RAILWAY COMPANIES, 2.

2. Contributory—Collision with anchor.

See MARITIME COURT OF ONTARIO, 2.

3. Collision causing death.

See MARITIME COURT OF ONTARIO, 3.

4. Of servants of the Crown.

See PETITION OF RIGHT, 1, 10, 11, 15.

5. Of lessee—Liability for fire.

See LANDLORD AND TENANT, 4.

6. Of railway company.

See RAILWAYS AND RAILWAY COMPANIES, 14, 15, 16, 17.

7. Of tug towing raft.

See MARITIME COURT OF ONTARIO, 4.

8. Of municipal corporation—Non-repair of streets.

See CORPORATIONS, 18.

Negligence—Continued.

9. Of municipal corporation, for defective bridge.

See CORPORATIONS, 19.

10. Of railway company—Damages—*Res ipsa loquitur*.

See RAILWAYS AND RAILWAY COMPANIES, 21.

11. Action against bridge company for damages to raft—Powers of company.

See NAVIGATION, 3.

12. Of railway company—Causing death of wife—Damages.

See RAILWAYS AND RAILWAY COMPANIES, 24.

13. Of solicitor, in not registering mortgage—Laches by client,

See SOLICITOR AND CLIENT, 2.

14. Railway company—Right to protect itself from liability for, by special contract—Railway Act, 1868, s. 20, s-s. 4—31 V. c. 43, s. 5.

See RAILWAYS AND RAILWAY COMPANIES, 25.

15. Of municipal corporation—Defective sidewalk—Contributory negligence—New trial.

See CORPORATIONS, 23.

16. Railway company—Accident—Ferry—Wharf—Absence of reasonable precautions.

See RAILWAYS AND RAILWAY COMPANIES, 26.

17. Ferry under control of corporation—Liability for injury to passenger—Contributory negligence.

See MUNICIPAL CORPORATION, 8.

18. In carriage of goods—Carriage over several lines—Custody—Bill of lading.

See COMMON CARRIERS.

19. Of railway company—Sparks from engine—Setting fire to adjoining land—Presumption as to cause of fire—Lapse of time before discovery.

See RAILWAYS AND RAILWAY COMPANIES, 40.

Negligence—Continued.

20. Leaving elevator unattended—Accident to one of the tenants of building—Liability of landlord—Damages—Art. 1054, C. C.—Cross appeal.

See DAMAGES, 49.

21. Carriage of goods by sea—Improper stowage—Bill of lading—Excepted perils.

See BILL OF LADING, 5.

22. Railway Co.—Carriage of goods—Carriage beyond terminus—Restriction of liability—Railway Act, R. S. C. c. 109, s. 104.

See RAILWAYS AND RAILWAY COMPANIES, 48.
CONTRACT, 34.

- 22a. Railway Co., death caused by negligence of, running through town—Contributory negligence—Insurance on life of deceased—No reduction of damages therefor.

See RAILWAYS AND RAILWAY COMPANIES, 46.

23. Railway company—Negligence—Approaching siding—Notice of approach—No statutory duty to whistle or ring.

See RAILWAYS AND RAILWAY COMPANIES, 49.

24. Railway company—Accident to employee—Performance of duty—Contributory negligence—The workmen's compensation for Injuries Act, (O.), 49 V. c. 28.

See RAILWAYS AND RAILWAY COMPANIES, 50.

25. Railway Co.—Sparks from locomotive—Damage by fire.

See RAILWAYS AND RAILWAY COMPANIES, 53.

26. Mercantile agency—False information—Confidential communication to subscriber.

See DAMAGES, 57.

LIBEL, 5.

27. Of solicitor in not registering judgment—Retainer to prosecute action—Duty of solicitor.

See SOLICITOR AND CLIENT, 5.

28. Railway company—Station buildings—Planked way—Invitation to public to use—Duty of company.

See RAILWAYS AND RAILWAY COMPANIES, 57.

Negligence—Continued.

29. Railway company—Contract to carry passengers—Special conditions—Notice of.

See RAILWAY AND RAILWAY COMPANIES, 58.

30. Municipal Corporation—Control over the streets—Alteration of grade—Contributory negligence.

See MUNICIPAL CORPORATION, 15.

31. *Responsibility—Vis major—Fall of wall after fire—Damages—Arts. 17, s-s. 24, 1053, 1055, 1071, C.C.*

Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged the plaintiff's house:

Held, affirming the judgments of the courts below, that the defendant could not shield himself under the plea of *vis major*, and was liable for the damages caused.

Nordheimer v. Alexander.—xix. 248.

32. Of servants of Crown—Liability of Crown for—Government railways—Construction of statute—50-51 V. c. 16.

See CROWN, 27.

PRESCRIPTION, 21.

STATUTE, 15.

33. Railway company—Construction of road—Impairing usefulness of highway.

See RAILWAYS AND RAILWAY COMPANIES, 66.

34. Municipal corporation—Duty to light streets—Obstruction of sidewalk—Position of hydrant.

See MUNICIPAL CORPORATION, 20.

35. Government railway—Land crossed by—Accumulation of surface water—Maintenance of boundary ditches—Liability of Crown.

See CROWN, 30.

36. Municipal corporation—Alteration of street—Lowering grade—Injury to adjacent land—Remedy for.

See MUNICIPAL CORPORATION, 21.

37. *Liability of Road Co.—Collector of tolls—Lessee.*

C. brought an action against the K. & B. Road Co. for injuries sustained from falling over a chain used to fasten the toll-gate on the company's road. On

Negligence—Continued.

the trial the following facts were proved: The toll-house extended to the edge of the highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was usually carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell sustaining the injuries for which the action was brought.

The toll collector was made a defendant to the action but did not enter a defence. It was shown that he had made an agreement with the company to pay a fixed sum for the privilege of collecting tolls for the year, and was not to account for the receipts. The company claimed that he was lessee of the tolls, and that they were not responsible for his acts. The jury found, however, that in using the chain to fasten the gate as he did he was only following the practice that had existed for some years previously, and doing as he had been directed by the company. The statute under which the company was incorporated contains no express authority for leasing the tolls, but uses the term "renter" in one section, and in another speaks of a "lease or contract" for collecting the tolls.

The company claimed, also, that C. had no right to use the board walk in walking along the highway, and her being there was contributory negligence on her part which relieved them from liability for the accident.

Held, affirming the decision of the Court of Appeal for Ontario, Gwynne, J., dissenting, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls, the company, under the finding of the jury, was liable for its acts.

Kingston and Bath Road Company v. Campbell.—xx. 605.

38. In working steam engine used in running hay-press—Damage by fire—Spark arrester—New trial ordered by court below.

See MISDIRECTION, 5.

39. *Negligence—Action for damages—Use of engine—Discharge of steam—Nuisance—Contributory negligence.*

The pipe from a condenser attached to a steam engine used in the manufacture of electricity passed through the floor of the premises and discharged the steam into a dock below some twenty feet from an adjoining warehouse into which the steam entered and damaged the contents. Notice was given to the electric company but the injury continued and an action was brought by the owners of the warehouse for damages.

Held, affirming the decision of the court below, that the act causing the injury violated the rule of law which does not permit one, even on his own land, to do anything, lawful in itself, which necessarily injures another, and the persons injured were entitled to damages therefor, more especially as the injury continued after notice to the company.

The Chandler Electric Co. v. Fuller.—xxi. 387.

Negotiorum Gestor—Action to account—Curator to substitution—Mandatory.

See WILL, 21.

New Brunswick—Dispute with Province of Canada as to territory—Timber licenses—Petition of right by licensee against Dominion Government.

See PETITION OF RIGHT, 20.

New Trial—Power to grant—Sa. 20 & 22 S. & E. C. Act.

See JURISDICTION, 20, 22, 23.

2. *In criminal appeal—Cons. Stats. U. C. c. 112, and Cons. Stat. L. C. c. 77, ss. 57, 58 & 59, as the same may be affected by 32 & 33 V. c. 29, s. 80, and 38 V. c. 11, s. 49.*

Held, that, since the passing of 32 & 33 V. c. 29, s. 80, repealing so much of c. 77 of Cons. Stat. L. C. as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case, and of 32 & 33 V. c. 36, repealing s. 68 of c. 77 Cons. Stats. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada, exercising the ordinary appellate powers of the court, under ss. 88 & 49 of 38 V. c. 11, should give the judgment which the court whose judgment is appealed from ought to have given, viz: to reverse the judgment which has been given, and order prisoner's discharge.

Laliberte v. The Queen.—i. 117.

3. *New trial—Evidence—Where improperly received and afterwards withdrawn by judge from jury—License to cut timber.*

The plaintiff was the licensee of certain Crown lands, under license from the Crown, to cut timber and logs thereon. These licenses did not contain any description or boundaries, but were described as (1) "No. 192 east half block 176 Muzeral Brook, containing three square miles," and (2) "South of main S. W. Miramichi River, N. east quarter of block 42, and the southern 1½ miles of block 41." The plaintiff endeavoured by the evidence of one Braithwaite and one Freeze to identify the lands alleged to be included in these licenses, and in their evidence and that of one Flynn proved that logs had been cut upon these blocks by two parties, respectively named Sutherland and Kirwan, and on the trial the plaintiff offered to prove the statements of these two parties and admissions made by them. The defendant's counsel objected to these statements as no evidence against the defendant, and on the objection being taken, the Chief Justice only admitted it on the plaintiff's counsel undertaking to connect the defendant with these parties, Sutherland and Kirwan. This he failed to do, but called one Coleman, an agent of the plaintiffs, to depose as to certain statements of the defendant. The plaintiff's counsel addressed the jury upon the whole evidence, commenting upon all the facts, but the learned Chief Justice in charging the jury said that if the case rested on the

New Trial—Continued.

evidence of Braithwaite, he was of opinion that the plaintiff failed to make out his case, and also stated his opinion that the declarations of Sutherland and Kirwan were not evidence against the defendant, and that the plaintiff's case must depend upon the conversations between Coleman and the defendant respecting the logs. Upon this charge, the jury found a verdict for the plaintiff for \$965.

A rule *nisi* was obtained for a new trial, and after argument, the rule was discharged by the first division of the Supreme Court of New Brunswick, the judges holding, under authority of *Wilmot v. Vanwart*, (1 P. & B. 496), that when evidence, which has been improperly received, has been withdrawn by the judge from the consideration of the jury, such improper admission of evidence is not a ground for a new trial.

On appeal to the Supreme Court of Canada, *Held*, that the Supreme Court of New Brunswick was correct in refusing a new trial on the ground of the improper admission of evidence; the plaintiff having failed to connect the statements of Sutherland and Kirwan with the defendant, such evidence was properly and sufficient withdrawn from the jury. But as regards Coleman's evidence there was not sufficient to go to the jury, and the learned Chief Justice should have left nothing to the jury. On this ground the rule *nisi* for a new trial should be made absolute.

Appeal allowed with costs.

Snowball v. Stewart.—16th February, 1881.

4. *New trial—Banker and customer—Deposit for special purpose—Where whole evidence before the court, case not sent back—S. 22, S. C. Act.*

A firm in Ottawa, called Satchell Brothers, effected a composition under the Insolvent Act of 1875, for 33½ per cent.

By their deed of composition and discharge the insolvents covenanted with their creditors to pay the composition in four payments, and to give each creditor their promissory notes for the several payments—the notes falling due: the first series on 4th November, 1876, the second on 4th May, 1877, the third on 4th November, 1877, and the fourth on 4th May, 1878.

The first notes, viz: those falling due on 4th November, 1876, were to be secured by the endorsement of a Mr. Hill and a Mr. Dobier, and all the notes were to be further secured by the assignee, Mr. Eastwood, holding in trust, as security for their due payment by the insolvents, certain real estate, which formed part of the assets.

The notes were duly given as agreed, and all of the first series were paid, except two, both of which were held by the Ontario Bank.

The gross amount of the composition was \$11,981.89; each instalment, therefore, was a little under \$3,000, the exact amount being \$2,992.97. The two unpaid notes were for \$260.84, and \$1,086.80. Satchell Brothers kept their account with the Ontario Bank. When these two notes matured they were charged to the account of Satchell Brothers, and a renewal note was

New Trial—Continued.

taken from them with the same endorsers for two months, for the amount of both notes which was \$1,297.14, and the original notes were cancelled.

The note was three times again renewed, always with the same endorsers, viz: for twenty days, ten days and thirty days. The last renewal note fell due on 1st May, 1877, three days before the second series of the composition notes. It was a note for \$1,810.97.

Sometime in the fall of 1876, Satchell Brothers, being unable to meet the composition payments, made application to the Trust and Loan Company for a loan of \$9,000—and subsequently for an additional sum of \$5,000—making together the sum of \$14,000, on the security of their real estate, which the Trust and Loan Company agreed to advance. The firm of Stewart, Chrysler and Gormully, solicitors, of which the plaintiff was the senior partner, was employed by the Trust and Loan Company as their agents in Ottawa, to see that the title to the property mortgaged was made satisfactory, and thereupon to complete the loan. A mortgage for \$9,000 was executed and registered in December, 1876, and a mortgage in the further sum of \$5,000 was given in March, 1877. On investigating the title it was found that the lands of Satchell Brothers were vested in the assignee, who held the same as security for the payment of the composition notes given by Satchell Brothers under the terms of the deed of composition above referred to and set out, and it became necessary to pay the whole composition and to obtain from the assignee a re-conveyance to Satchell Brothers, to protect the title of the Trust and Loan Company, as mortgagees, before the loan could be carried out by that company. To secure that company the plaintiff was instructed to purchase or pay all the composition notes remaining unpaid, and for that purpose, on the 8rd May, 1877, the Trust and Loan Company, through their solicitors in Toronto, enclosed two cheques to the plaintiff for the respective sums of \$8,599.90 and \$4,780.70, with directions to pay the notes falling due the following day. On the 4th May the plaintiff deposited in the appellants' bank the following cheque of his firm:

“ OTTAWA, May 4th, 1877.

“ THE CANADIAN BANK OF COMMERCE,

“ Pay Manager Ontario Bank or order \$4,500 to purchase composition notes of Satchell Brothers for Trust and Loan Company of Canada.

STEWART, CHRYSLER & GORMULLY.”

“ \$4,500.”

This was endorsed by the Manager: “Credit Satchell Brothers' composition account. Sd, J. H. WOODMAN, Manager.”

The second instalment of composition notes which fell due on that day, together with the said note for \$1,810.97, was paid and charged against said deposit.

Mr. Woodman, the bank manager who held the one note then three days over due, and at whose office all the notes falling due that day were payable, had been assured by the Satchells in the previous October or November that the over-due note should be the first thing paid out of the loan they had then in contemplation, and he was therefore prepared to find that that note was being provided for. One Harper was bookkeeper for the Satchells, and had

New Trial—Continued.

in fact been their agent in procuring Mr. Woodman to hold over the note in expectation of payment from the loan. He does not appear to have known that the money was lent to pay the latter notes only, and he had that very day a statement showing notes to the amount of \$4,100 to be paid, including the \$1,810.97 note. But while Woodman and Harper were thus depending on having this particular note paid, the plaintiff was ignorant of its existence.

As soon as the plaintiff became aware that the note had been charged to this account he protested against the right of the defendants to do so. He afterwards paid in other moneys from time to time to meet the third and fourth instalments, and at last he signed the formal confirmation of his account, required by some banks when the customer's cheques are returned to him. This was an oversight and was corrected by a tender of the note in question, and a demand of the money.

This action was instituted to recover from the bank the sum of \$1,810.97.

The case was tried before Mr. Justice Cameron and a jury. The only question left by the learned judge to the jury was the following :

" Was this \$1,810 a composition note or was it not? Was it a composition note of Satchell Brothers?" And he directed the jury that if it was not such, the defendants (the Ontario Bank) were not justified in charging it against the deposit of \$4,500, and that the plaintiff would be entitled to recover. The jury rendered a verdict for the plaintiff for \$1,508.50; the learned judge reserving leave to the defendants to move to enter a non-suit. The defendants obtained a rule *nisi* in the Court of Common Pleas, calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial had between the parties or a non-suit entered pursuant to the leave reserved at the trial, or why a new trial should not be had between the parties, on the ground that the verdict was contrary to law and evidence, and against the weight of evidence. Judgment was given making absolute the said rule *nisi* and ordering that the verdict be set aside and a new trial had between the parties without costs, on the ground that the note was a composition note and that the only question left to the jury, being whether this note was or was not a composition note, and the jury, having found a verdict for the plaintiff, must have been of the opinion that it was not, and consequently the finding of the jury was contrary to the evidence.

From the judgment of the Court of Common Pleas, the respondent appealed to the Court of Appeal for Ontario, which allowed the said appeal with costs, and directed that the rule *nisi* in the Court of Common Pleas should be discharged with costs, on the ground that the question as to whether the note in question was a composition note or not was immaterial, and that there was no evidence proper to leave to the jury on behalf of the defendants, and the defence set up was not maintainable in law upon the undisputed facts in evidence.

On appeal to the Supreme Court of Canada, **Held**, Ritchie, C.J., doubting, and Gwynne, J., dissenting, that the judgment of the Court of Appeal should be affirmed; that the deposit in the defendants' bank was for the specific purpose of meeting the notes due that day, and the manager was not authorized to apply the money to take up the note in question, and there was no

New Trial—Continued.

ratification by plaintiff of his act. The whole case being before the court on undoubted evidence it was unnecessary to refer it to another jury.

Per Gwynne, J. The case having been tried only upon a question wholly irrelevant, as to whether the note in question was a composition note or not, and nothing else having been submitted to the jury, the verdict was the result of a defective proceeding, and there was a total miscarriage which could only be rectified by a new trial.

This court has been given by special statute jurisdiction in its discretion to order a new trial if the ends of justice may seem to require it, although such new trial may be deemed necessary upon the ground that the verdict is against the weight of evidence—that is to say, upon a ground for which it would have been competent for the court of first instance in the mere exercise of its discretion to have ordered a new trial. But that this court should prevent the taking place of a trial, which the court of first instance had thought fit to order, purely in the exercise of the discretionary power vested in that court, is an assertion of jurisdiction which is wholly beyond the powers vested in this court by its constitution.

Appeal dismissed with costs.

Ontario Bank v. Stewart.—11th April, 1881.

5. Directed by Court of Review—34 V. c. 4, s. 10, and 35 V. c. 6, s. 13 (P. Q.).

See RAILWAYS AND RAILWAY COMPANIES, 14.

- 5(a). Ordered where finding of jury not satisfactory on question of negligence.

See RAILWAYS AND RAILWAY COMPANIES, 17.

6. Where rule taken for new trial only, the rule was affirmed, and non-suit or verdict for defendant refused, though the court was of opinion there was no binding contract between the parties.

See SALE OF GOODS, 13.

7. Where case reserved on questions of fact as well as of law.

See CORPORATIONS, 19.

8. When ordered by court below—Evidence not so clear as to justify a reversal of decision.

See TRESPASS, 12.

9. Appeal by defendants from Rule ordering a new trial—Affirmed, though plaintiff held entitled to recover, there being no cross-appeal.

See RAILWAYS AND RAILWAY COMPANIES, 21.

New Trial—Continued.

10. Sale of lands by Real Estate Agents—Mistrial—Omission to submit material questions to Jury.

See SALE OF LANDS, 12.

11. *Verdict against weight of evidence—Appeal.*

Where court below in exercise of its discretion has ordered a new trial on the ground that the verdict is against the weight of evidence, the Supreme Court will not hear the appeal.

Eureka Woollen Mills Co. v. Moss.—xi. 91.

12. But where new trial granted on questions of law as well as of fact, appeal will be heard—*Eureka Woollen Mills v. Moss*, 11 Can. S. C. R. 91, approved and distinguished.

See INSURANCE, FIRE, 15.

13. Where evidence of contributory negligence not properly left to the Jury—Defective sidewalk—Liability of corporation.

See CORPORATIONS, 23.

14. *Verdict against weight of evidence.*

An action was brought to recover the price and value of goods sold by the plaintiff to the defendant's brother, and on the trial the plaintiff gave evidence of an agreement with the defendant whereby the latter, as the plaintiff alleged, undertook to give notes at four months to retire notes at three months given by his brother, the purchaser of the goods. The plaintiff swore that this agreement was carried out for a time, but that the defendant finally refused to continue it any longer. The evidence showed that the defendant always gave his notes to his brother who carried them to the plaintiff. The defendant, on the other hand, swore that he never made any such agreement, but only gave notes to his brother to help him in his business. The evidence of the plaintiff was entirely uncorroborated. A verdict was found for the plaintiff and the Supreme Court of New Brunswick refused a new trial.

Held, Ritchie, C.J., and Taschereau, J., dissenting, that the weight of evidence was not sufficiently in favour of the plaintiff to justify the verdict, and there must be a new trial.

Appeal allowed with costs and new trial granted.

Fraser v. Stephenson.—8th March, 1886.

15. *Verdict for plaintiff—Technical breach of contract—Defendant entitled to nominal damages for.*

In an action on a contract and also on the common counts to recover the balance of the contract price for work done for the defendant, the evidence showed that there was a technical breach of the contract by which, however, the defendant had sustained no substantial damage. A verdict was found for

New Trial—Continued.

the plaintiff and a rule for a new trial was refused by the Divisional Court, and also by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, that a verdict would not be set aside merely to enter a verdict for the other party for nominal damages.

Beatty v. Oille.—8th March, 1886.—xii. 706.

16. When doubtful whether a non-suit has been voluntary or otherwise, a new trial will be ordered.

See NON-SUIT, 1.

17. Misdirection in not submitting question to jury.

See INSURANCE, MARINE, 21.

18. Evidence—Admissibility of—Entries in books—Goods charged to third parties.

See EVIDENCE, 88.

19. Motion for—Refusal of Court of Appeal to interfere, the circumstances being peculiar—Jurisdiction—S. & E. C. Act, R. S. C. c. 135, s. 24, (*d*).

See JURISDICTION, 63.

20. Goods sold and delivered—Credit—Direction to jury—Withdrawal of evidence from jury.

See EVIDENCE, 42.

21. Judgment on motion for—Notice of appeal—S. & E. C. Act, R. S. C. c. 135, s. 41—Extension of time for giving notice—Application after time expired.

See JURISDICTION, 73.

22. Judgment on motion for new trial—S. & E. C. Act, R. S. C. c. 135), s. 24 (*d*)—Construction of—Non-jury case.

See JURISDICTION, 74.

23. Marine insurance—Right to recover for partial loss in action for total loss—New trial to ascertain such damages if parties unable to agree on reference to ascertain amount.

See INSURANCE, MARINE, 30.

24. Order for—Insufficient answer by jury to one of questions submitted—Not a final judgment—S. & E. C. Act, R. S. C. c. 135, ss. 24 (*g*), 30 & 61.

See JURISDICTION, 78.

New Trial—Continued.

24. Order for, on ground that assignment of facts and answers of jury to questions insufficient—Not a final judgment—S. & E. C. Act, R. S. C. c. 135, ss. 24 (*g*), 30 & 61.

See JURISDICTION, 80.

25. Improper admission of evidence—Cross-examination—Conversation partly given on examination in chief—Belief as to signature on note—Order for new trial reversed.

See EVIDENCE, 50.

26. Nova Scotia Judicature Act—Rule 476—Motion for new trial—Disposal of whole case on—Directions to jury—Observations by judge on issue not raised by pleadings.

See PRACTICE, 19.

27. Charge to jury—Refusal to instruct jury as to what constitutes fraud under Statute of Elizabeth—Taking accounts.

See PRACTICE, 20.

28. Trespass to land—View of premises by jury—Misconduct of defendant at view—Nominal damages.

See TRESPASS, 20.

29. Promissory note—Failure of consideration—Sale of machine for polishing wood—Knowledge of defects.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 20.

30. Action for libel—Excessive damages—Alternative of reduction of, or new trial.

See LIBEL, 7.

31. Sale of goods—Partners—To whom credit given—Entries of other goods on previous dealings—Recovery for items of which not sufficient proof—Order for new trial in the event of refusal to consent to reduction of verdict.

See EVIDENCE, 63.

32. Ordered by court below—Interference with order for—Misdirection—Negligence—Damage by fire—Spark arrester.

See MISDIRECTION, 5.

New Trial—Continued.**83. Appeal—Order for new trial—Interference with.**

Appeal from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff and ordering a new trial.

The action was brought to recover from the Bank of New Brunswick the amount of a special deposit by the plaintiff, and the defence was that such amount had been already paid to an agent of the plaintiff who had endorsed plaintiff's name upon and given up the deposit receipt. As against this defence it was contended that no such authority was given to the agent and that plaintiff's name had been forged on the receipt. The jury found the facts in favour of this contention, and plaintiff obtained a verdict which was set aside by the full court and a new trial ordered. Plaintiff sought to appeal.

The court **Held**, that a new trial having been ordered to try certain questions of fact in the case, such order should not be interfered with by an appellate court.

Scott v. The Bank of New Brunswick.—xxi. 30.

34. Aged and infirm witness — Death of after trial—Inutility of new trial.

See SHIPS AND SHIPPING, 14.

35. Libel—Pleading, "Not Guilty" and "Fair Comment"—Reception of evidence to prove charge of personal dishonesty—Rejection of evidence in rebuttal—General verdict.

See LIBEL, 8.

Newspaper.—Authority to publish—Corporation publisher and proprietor—Deposit of affidavit or affirmation—Contents—Who may make—Newspaper Act, 50 V. c. 23, (Man.).

By s. 1 of the Act of Manitoba respecting newspapers, 50 V. c. 23, no person shall print or publish a newspaper until an affidavit or affirmation made and signed, and containing such matter, as the Act directs has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published; by s. 2 such affidavit or affirmation shall set forth the real and true names, &c., of the printer or publisher of the newspaper and of all the proprietors; by s. 6 if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; and s. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Held, 1. That 50 V. c. 23 contemplates, and its provisions apply to, the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That s. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne, J., dissenting.

Newspaper—Continued.

3. That the affidavit or affirmation in case the proprietor is a corporation, may be made by the managing director.

Ashdown v. Manitoba "Free Press" Company.—xx. 43.

And see LIBEL, 6.

2. Libel in—Action for—Additional libel in plea—Damages—Excessive—Consent to reduction of verdict, or alternative of new trial.

See LIBEL, 7.

Nonjoinder—Of tenants in common in action for use and occupation.

See TENANTS IN COMMON.

Nonsuit—Voluntary—New trial.

On the trial of an action in Nova Scotia the plaintiff was non-suited, and on the argument of a rule to set such non-suit aside, and for a new trial, it was contended that the non-suit was voluntary. The minutes of the judge who tried the cause merely stated that a non-suit was moved for, that the plaintiff's counsel replied, and that judgment of non-suit was entered, and the judge himself said that he believed the understanding to be that a rule was to be granted. The Supreme Court of Nova Scotia held the judgment of non-suit to be voluntary, and discharged the rule.

On appeal to the Supreme Court of Canada, Held, that as there was a doubt as to what took place at the trial, the parties were entitled to the benefit of that doubt, and the rule to set aside the non-suit must be made absolute.

Appeal allowed with costs.

Lery v. Halifax & Cape Breton Ry. & Coal Co.—24th Feb. 1886.

2. In action between adjoining land owners, for allowing water to accumulate in cellar.

See DAMAGES, 20.

NEW TRIAL.

3. In action for injury committed by vicious dog—Ownership—Scienter—Evidence for jury.

See DAMAGES, 59.

North Shore Railway Company—Rights to use streets of city of Quebec.

See CORPORATIONS, 21.

North-West Territories—Appeal will lie from the Supreme Court of, although the matter may not have originated in a Superior Court—51 V. c. 37, s. 3 (D.).

See JURISDICTION, 68.

2. Ordinance of, relating to chattel mortgages—Ord. of 1881, No. 5—Chattel mortgage, renewal of—Time for filing—Description of goods—Sufficiency of.

See CHATTEL MORTGAGE, 12.

Notary—Duty of.

See SUCCESSION.

2. Evidence of, not admissible to contradict deed prepared by him.

See SALE OF LANDS, 9.

3. As arbitrator—Not disqualified from having acted professionally—44 V. c. 43 (Q.).

See ARBITRATION AND AWARD, 8.

4. *Notarial Code*—R. S. Q., Art. 3871—Board of notaries—Disciplinary powers—Prohibition.

When a charge derogatory to the honour of the profession of notary is made against a notary under the provisions of the Notarial Code, R. S. Q., Art. 3871, which amounts to a crime or felony, the Board of Notaries has jurisdiction to investigate it without waiting for the sentence of criminal jurisdiction.

Tremblay v. Bernier.—xxi. 409.

Notice—To member of benefit society.

See BENEFIT SOCIETY.

2. To agent.

See INSURANCE.

3. Required to defeat registered deed.

See TRESPASS, 5.

4. Want of.

See ASSESSMENT, 1, 4.

5. Of action—Fishery officer not entitled to.

See FISHERIES.

6. Purchase for value without.

See MORTGAGE, 9.

Notice—Continued.**7. To third arbitrator, necessary.**

See ARBITRATION AND AWARD, 5.

**8. Notice of action for false arrest—C. S. L. C. c. 101, s. 1—*Extra judicial to deal with question not directly before the court*
—C. C. P. 1st pt. Gen. Provs. s. 22.**

David Grant, who was the plaintiff in the first instance, was Grand Master of the Orange Order in Montreal during 1877-78. As such he was arrested for disturbing the peace, and brought an action against the Mayor of the city (the respondent) for false arrest. A notice of action was given by appellant's attorney to the respondent, as follows:—

"To the Hon. J. L. Beaudry, Mayor of Montreal.

"Sir.—We give you notice that David Grant of the city of Montreal, salesman and trader, will claim from you personally the sum of ten thousand dollars damages, by him suffered from the abuse made of your authority in causing his arrest illegally and for no cause on the 12th day of July last (1878), and that unless you make proper amend and reparation of such damages within a month, judicial proceedings will be adopted against you. Yours, etc.

"(Signed,) Doutre, Branchaud & McCord,

"Advocates for plaintiff.

Montreal, 19th October, 1878."

The Superior Court (Mackay, J.) Held, that under the C. C. P. (P.Q.), Art. 22 and Con. Stat. L. C. c. 101, s. 1, the respondent was entitled to a notice of action, and that the notice given was insufficient in not stating the place where the alleged arrest was effected, and also in not stating the name and residence of plaintiff's attorney or agent, and he dismissed the action. This judgment was confirmed by the Court of Queen's Bench, but that court went further, and Held, that Grant was properly arrested, being a member of an illegal association. (*See* 2 Dorion's Q. B. R. 197).

On appeal to the Supreme Court of Canada, Held, that the notice of action was insufficient, for the reasons given by the court below, and also because the cause or causes of action, as set out in the declaration, were not sufficiently stated in the notice, and that any expression of opinion as to the legality or illegality of the Orange association would be extra judicial and unwarranted.

Appeal dismissed with costs.

Grant v. Beaudry.—11th January, 1888.

See, also, MALICIOUS ARREST.

9. Of claim for loss of goods—Carriage by railway—Limitation of time—Loss of part.

See RAILWAYS AND RAILWAY COMPANIES, 48.

10. Expropriation for railway purposes—Abandonment of notice to take lands—R. S. C. c. 109, s. 8, ss. 26 & 34.

See RAILWAYS AND RAILWAY COMPANIES, 44.

Notice—Continued.

11. Partnership—Breach of conditions—Expulsion of partner—Waiver—Goodwill.

See PARTNERSHIP, 14.

12. Discount of note by bank—Partner in two firms—Use of name of one for purposes of the other—Notice of authority.

See PARTNERSHIP, 16.

13. *Of action—Contractor to build Government Railway—Government Railway Act, 44 V. c. 25, s. 109—Construction of term “employee.”*

Section 109 of the Government Railway Act of 1881 (44 V. c. 25), provides that “no action shall be brought against any officer, employee or servant of the department [Railways and Canals] for anything done by virtue of his office, service or employment, except within three months after the act committed, and upon one month’s previous notice in writing”

Held, reversing the judgment of the court below, Ritchie, C.J., and Gwynne, J. dissenting, that a contractor with the Minister of Railways and Canals, as representing the crown, for the construction of a branch of the Intercolonial Railway, is not an “employee” of the department within this section.

Kearney v. Oakes.—xviii. 148.

14. To quit—Sub-tenancy—Expiration of original lease—Possession after.

See LANDLORD AND TENANT, 9.

15. *Statutory notice—Form.*

The Revised Statutes of Nova Scotia, 4 ser. c. 94, s. 355, authorizes the assignee of a chose in action in certain cases to sue thereon in the Supreme Court as his assignor might have done, and s. 357 provides that before such action is brought a notice in writing, signed by the assignee, his agent or attorney, stating the right of the assignee and specifying his demand thereunder, shall be served on the party to be sued. Pursuant to this section the assignee of a debt served the following notice:—“Pictou, Nov. 21st, 1878, ALEX. GRANT, Esq.: Admin. Estate of Alexander McDonald, deceased. DEAR SIR,—You are hereby notified in accordance with c. 94 of the Revised Statutes, s. 357, that the debt due by the above estate of Finlay Thompson has been assigned by him to Alexander D. Cameron, who hereby claims payment of twelve hundred dollars, the amount of the said debt so assigned to him. S. H. HOLMES, Atty. of ALEX. D. CAMERON”—

Held, affirming the judgment of the court below, that the notice was a sufficient compliance with the statute.

Grant v. Cameron.—May 6, 1891.—xviii. 716.

See LIMITATIONS, 12.

Notice—*Continued.*

16. Dismissal from service—Construction of contract—Non-performance of duties.

See MASTER AND SERVANT, 2.

17. Insurance against accident—Failure to give notice—Defence of—Refusal to pay on other grounds—Waiver.

See INSURANCE LIFE, 18.

18. Notice of action—Sufficiency of—Malicious and illegal arrest and imprisonment by justice of the peace.

See MALICIOUS ARREST.

19. Of action—Want of not pleaded—34 V. c. 11 (N.B.)—25 V. c. 16 (N.B.)—Municipal corporation—Duty to repair streets.

See MUNICIPAL CORPORATION, 25.

20. Of action—Municipal corporation—Drainage of lands—Injury to other lands by—Arbitration—Mandamus.

See MUNICIPAL CORPORATION, 26.

21. Mortgage of lands—Omission by mistake—Rectification—Sale of lands—Defence of purchase for value without notice.

See VENDOR AND PURCHASER, 4.

- Nova Scotia**—Legislative Assembly of—Power to punish for contempt.

See LEGISLATURE, 9.

- Nova Scotia Judicature Act**—Motion for new trial—Rule 476—Disposal of which case on motion—Directions to jury—Observations by judge on issue of fraud not raised by pleadings.

See PRACTICE, 19.

- Novation**—Partnership—Dissolution—New partnership by continuing partner—Liability of new partner.

See PARTNERSHIP, 18.

2. **Insolvency**—Knowledge of by creditor—Fraudulent preference pledge—Warehouse receipt—Arts. 1975, 1034, 1035, 1036, 1169, C. C.

See INSOLVENCY, 32.

Novus Actus Interveniens.*See* CHATTEL MORTGAGE, 1.**Nuisance—Damages—Possession of wharf built on public property—Right of action for trespass.**

C. et al. built a wharf in the bed of the St. Lawrence, which communicated with the shore by means of a gangway, and had enjoyed the possession of this wharf and its approaches for many years, when *R.*, on the ground that the wharf was a public nuisance, destroyed the means of communication which existed from the wharf to the shore. *C. et al.* sued *R.* in damages, and prayed that the works be restored. After issue joined, *R.* filed a supplementary plea, alleging, that since the institution of the action, one *C. R.*, through whose property *C. et al.*'s bridge passed to reach the street on shore, had erected buildings which prevented the restoration of the bridge and wharf.

Held, that *R.* having allowed *C. et al.* to erect the gangway on public property and remain in possession of it for over a year, had debarred himself of the right of destroying what might have been originally a nuisance to him, and that, notwithstanding the subsequent abandonment of this wharf and gangway, *C. et al.* were entitled to substantial damages.

Caverhill v. Robillard.—ii. 575.**2. Obstruction in navigable waters.***See* NAVIGATION.

PRACTICE, 43.

3. Pollution of running stream—Long established industry—Injunction.

W. acquired a lot adjoining a small stream at Cote des Neiges, Montreal, and finding the water polluted from certain noxious substances thrown into the stream brought an action in damages against *C.* the owner of a tannery situated 15 *arpents* higher up the stream, and asked for an injunction. At the trial it was proved that *C.* and his predecessors had from time immemorial carried on the business of tanning leather there, using the water for tanning purposes to the knowledge of all the inhabitants without complaint on their part; that it was the principal industry of the village; that the stream was partly used as a drain by the other proprietors of the land adjoining the stream and manure and filth were thrown in, but that every precaution was taken by *C.* to prevent any solid matter from falling into the creek. *W.* only acquired the property since *C.* had been using the stream for the purpose of his tannery, and there was no evidence that the property had depreciated in value by the use *C.* made of the stream.

Held, affirming the judgment of the court below, that *W.*, under the circumstances proved in this case, was not entitled to an injunction to restrain *C.* from using the stream as he did.

Weir v. Claude.—xvi. 575.

Nuisance—*Continued.*

4. Discharge of steam from engine—Negligence—Damages—"Sic utere tuo ut alienum non laedas."

See NEGLIGENCE, 39.

Nullity—Absolute.

See SHERIFF, 5.

O.

Official arbitrators—Appeal from.

See ARBITRATION AND AWARD, 9.

Ontario Judicature Act, 1881, s. 43—Constitutionality of.

See JURISDICTION, 25, 72.

Opposition.—*To seizure of real estate—Prescription—Renunciation, effect of, under Art. 1379, C.C.L.C.; Art. 2191, C.C.L.C.; Art. 632, C. P. L. C.*

In January, 1856, R. McC. sold certain real estate to J. McC., his sister, by notarial deed, in which she assumed the qualities of a wife duly separated as to the property of her husband, J. C. A. After the latter's death, in 1866, J. McC., before a notary, renounced to the *communauté de biens* which subsisted between her and her late husband. E. C. K., a judgment creditor of R. McC., seized the real estate as belonging to the vacant estate of the said R. McC., deceased. J. McC. opposed the sale on the ground that the seizure was made *super non domino et possidente*, and setting up title and possession. She proved some acts of possession, and that the property had stood for some time in the books of the municipality in her name. E. C. K. contested this opposition on the ground that J. McC.'s title was bad in law, and simulated and fraudulent, and that there was no possession.

Held, that by her renunciation to the *communauté de biens* which subsisted between her and her late husband at the date of the deed of January, 1856, J. McC. divested herself of any title or interest in said lands, and could not now claim the legal possession of the lands under that deed or by prescription, or maintain an opposition because the seizure was *super non domino et possidente*.

McCorkill v. Knight.—iii. 233.

Opposition—Continued.**2. Appearance by Attorney without authority—Judgment by default—Action in disavowal—Requête civile—Opposition à fin d'annuler—Arts. 483, 484, 505, C. C. P. P. Q.—Con. S. L. C. c. 83, s. 112—Application to stay settlement of minutes and entry and execution of judgment of Supreme Court—S. 46, S. C. Act.**

The appellant, jointly with S. J. Dawson, signed a promissory note in favor of the late Angus McDonald, in his lifetime of Becancour in the Province of Quebec, at Three Rivers, on the 20th day of February, 1862, for the sum of \$800, payable at the Bank of Upper Canada in Three Rivers, on the 25th of the following month of June, 1862.

On the 1st day of April, 1874, Severe Damoulin, Esq., Sheriff of the district of Three Rivers, wrote to the appellant that a judgment against him had been placed in his hands for execution, and this letter, the appellant alleged, was the first he had ever heard of the note since the day he had signed it.

The appellant being absent at the time and ignorant of any proceedings against him, on receipt of Sheriff Damoulin's letter filed an opposition *à fin d'annuler* and petition.

It appeared that a summons had issued out of the Superior Court at Three Rivers on the 10th October, 1866, against the two signers of the note, said appellant and the said S. J. Dawson, which was served at the domicile of the said S. J. Dawson, but of which the bailiff made return that he had served a copy at their domicile (although the appellant alleged he had no domicile in Three Rivers at the time) and on the 26th October, 1866, an appearance was filed for the defendants by Mr. J. B. O. D., advocate, but without any authority from the appellant, who knew nothing of the proceedings.

The next proceeding taken, after this appearance, in prosecution of the suit was by a notice served on the said J. B. O. D., on the 5th January, 1874, without any step having been taken by the plaintiff in all that time.

Proceedings were carried on and services effected on the said J. B. O. D., of which he appears to have taken no notice up to judgment by default on the 2nd day of March following, of all which the appellant alleged he was in utter ignorance, until apprised of the execution in his hands by the Sheriff's letter of 1st April, 1874, as above.

Mr. D., upon oath, stated that he was never employed by the appellant, had never any communication with him upon the subject of this suit and never informed him of the proceedings when served with notices in continuation of the suit in 1874. And further that shortly after the appearance was filed by him in October, 1866, he was informed by the other defendant, who alone had employed him, that the case was settled.

The Superior Court of Lower Canada, (Polette, J.), dismissed the appellant's opposition with costs, and this judgment was affirmed by the Court of Queen's Bench.

Opposition—Continued.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgments of the courts below, that the opposition could not be taken to have been made under Art. 484 of the Code of Proc., the judgment of the 2nd March, 1874, having been rendered by the court in term, and against such a judgment this opposition does not lie. That under C. S. L. C. c. 83, s. 112, the appellant should have proved that the place where the process was served was not his real domicile, and this he had not attempted to do. That if made under Art. 505 of the Code of Proc., the appearance by attorney covered any defect in the signification or the bailiff's return, or even an entire want of signification, and this would be fatal under Art. 503, as well as Art. 483. That the only way the appellant could get rid of the appearance was by a regular disavowal, according to articles 192 and following of the C. C. P. No such disavowal having been made, he must be taken to have waived, by the appearance filed in his name, all the irregularities in the service and even the entire absence of service.

Appeal dismissed with costs.

Dawson v. Macdonald.—10th June, 1880.

2. (a.)

On the 26th November, 1880, an application was made to Taschereau, J., in chambers for an order directing the registrar not to settle the minutes of the judgment rendered by the court on the 10th June, 1880, and not to tax the costs, and to restrain the plaintiffs from entering said judgment, and taxing said costs, the object of the appellant being to stay the execution of such judgment to allow him to disavow the attorney who appeared for him in the court below, and to proceed against the judgment against him by *requête civile*.

Held, that as to the disavowal, it was too late for the defendant to take such a proceeding, the attorney having appeared on the 26th Oct., 1866, and the defendant having been aware of it on the 29th April, 1874, when he filed his first opposition in the cause. That the judgment of the Supreme Court must under s. 46 of the S. C. Act be entered and sent to the court below before the defendant could have recourse to a proceeding by *requête civile*. The *requête civile* does not stay the execution as a matter of course, an order of the court or judge being necessary, and the defendant would have to apply to the Superior Court or a judge thereof for such an order. That a judge in chambers should not grant an order staying the execution of a judgment of the court, especially when the appellant has had ample opportunity of making his application to the full court.

Application refused with costs fixed at \$10.

Dawson v. Macdonald.—26th November, 1880.

2 (b.)

After these decisions against him, appellant Dawson took regular proceedings in disavowal against the attorney, J. B. O. D.

That disavowal was produced before the Superior Court at Three Rivers, and served upon the said attorney and the other parties in this case on the 14th December, 1880. Nevertheless, a new writ of execution was issued, at the instance of the respondent on the 15th of December, 1880, to enforce the execution of the original judgment against the appellant.

Opposition—Continued.

On the 80th December, 1880, the appellant produced an opposition to this last mentioned execution, and also a petition to stay the proceedings in the suit while expecting a decision on the disavowal which had just been produced.

The principal reasons of the opposition and petition were: (1) That the appellant had disavowed the attorney, J. B. O. D., who had appeared for him, and that he was prepared to maintain the said disavowal; (2) That the said disavowal had been served upon all the parties in the case; (3) That, on the 15th of December, 1880, an action in revocation of the original judgment in this cause had been issued.

The appellant, moreover, averred in this new opposition and petition, reasons founded upon certain facts which had only come to his knowledge since the first opposition which he had produced.

The conclusions were that all the proceedings had and made in virtue of the said writ, and that all proceedings in the present cause be stayed according to law until the decision of the proceedings had and taken by the said opposant in the present cause, as well on the disavowal filed therein as on the action of revocation of the judgment in this cause.

Issue was joined on these several proceedings and the appellant and respondents consented by written agreement that these different issues should be decided upon a common proof.

On the disavowal, the disavowed attorney, J. B. O. D., duly filed an appearance, and the respondents also appeared by their attorneys. The pleas of the disavowed attorney, with exhibits, were filed, and a petition for a Commission Rogatoire was presented by the plaintiff in disavowal, the present appellant, to examine a witness absent from Three Rivers. The decision on that petition was suspended until a decision on a demurrer produced by the disavowed attorney. That demurrer was not decided, and the respondents in the meantime pressed the production of the proof on the opposition.

The Superior Court at Three Rivers dismissed this opposition on the 2nd of October, 1882, on the principle that there was *res judicata*. This last judgment was confirmed by the Court of Queen's Bench of Lower Canada, on the same ground, Mr. Justice Tessier dissenting.

The appellant, Dawson, then appealed to the Supreme Court of Canada.

Held, reversing the judgments of the courts below, that there was no *res judicata*, and that all proceedings in the cause and on the writ of *pluries ven. ex de bonis* mentioned in the opposition should be stayed until the decision of the disavowal and of the action in revocation of judgment. Ritchie, C.J., and Strong, J., dissenting.

Appeal allowed with costs.

Dawson v. Macdonald.—12th January, 1885.

2. (c.)

While the proceedings were going on on the opposition of the 80th December, 1880, another writ of execution was issued in the original cause to collect the costs awarded to respondents by the Supreme Court of Canada on the 10th June, 1880. To this writ the appellant Dawson filed a second opposition on

Opposition—Continued.

the 18th January, 1881. This opposition was dismissed by the Superior Court, and the judgment of that court was confirmed by the Court of Queen's Bench. The latter court refused an appeal from the judgment on this second opposition, on the ground that the amount in dispute was not sufficient to authorize an appeal.

Dawson thereupon moved before the Supreme Court of Canada for an order to suspend the proceedings under the execution to which the opposition of the 18th January, 1881, was filed, and for leave to appeal from the judgment on said opposition.

Held, that there was no ground for staying the execution. The court had properly dismissed the appeal on the case presented, and that was a final decision in itself, and it was no ground for staying the execution that there were other proceedings in the court below which might possibly show that the defendant should have succeeded in the original action.

Motion refused with costs.

Dawson v. Macdonald.—15th January, 1884.

3. To seizure for an amount less than \$2,000—Appeal from Province of Quebec—Jurisdiction.
See JURISDICTION, 27, 81, 86.
4. In nature of Petition in revocation of judgment.
See SHERIFF, 5.
5. Attorney's lien for costs—Moneys deposited in hands of prothonotary—Opposition *en sous ordre*—Art. 753, C. C. P.
See SOLICITOR AND CLIENT, 4.
6. Opposition *à fin de charge*—Pledge—Art. 419, C. C.—Agreement to retain possession of railway for disbursements—Void as against creditors—Arts. 1977, 2015 & 2094, C. C.
See PLEDGE, 5.

P.

Parliament of Canada—Dominion Controverted Elections Act, 1874—*Intra vires*—Dominion court—Procedure—B. N. A. Act, 1867, ss. 18, 41, 91, 92, s-ss. 13 & 14, ss. 101, 129.
See ELECTION, 4.

2. Act establishing Maritime Court of Ontario *intra vires*.
See MARITIME COURT OF ONTARIO, 1.

Parliament of Canada—Continued.

3. Jurisdiction over harbours—Foresore in Summerside Harbour.
See HARBOUR.

4. *Jurisdiction of, over Bay of Chaleurs—The Fisheries Act, 31 V. c. 60—14 & 15 V. c. 63 (Imp.)—Justification, plea of—Fishery officer, right of, to seize "on view."*

Held, under the Imperial Statute, 14 & 15 V. c. 63, regulating the boundary line between old Canada and New Brunswick, the whole of the Bay of Chaleurs is within the present boundaries of the Provinces of Quebec and New Brunswick, and within the Dominion of Canada and the operations of The Fisheries Act, 31 V. c. 60. Therefore the act of drifting for salmon in the Bay of Chaleurs, although that drifting may have been more than three miles from either shore of New Brunswick or of Quebec abutting on the bay, is a drifting in Canadian waters and within the prohibition of the last mentioned Act and of the regulations made in virtue thereof.

2. The term "on view" in s-s. 4 of s. 16 of The Fisheries Act, is not to be limited to seeing the net in the water while in the very act of drifting. If the party acting "on view" sees what, if testified to by him, would be sufficient to convict of the offence charged, that is sufficient for the purposes of the Act.

Mowatt v. McFee.—v. 66.

5. *Canada Temperance Act, 1878—Constitutionality of—Powers of Dominion Parliament—Ss. 91 & 92, B. N. A. Act, 1867—Power to prohibit sale of intoxicating liquors—Distribution of legislative power.*

Held, 1. That the Act of the Parliament of Canada, 41 V. c. 16, "an Act respecting the Traffic in Intoxicating Liquors," cited as the "The Canada Temperance Act, 1878," is within the legislative authority of that body.

2. That by the British North America Act, 1867, plenary powers of legislation are given to the Parliament of Canada over all matters within the scope of its jurisdiction, and that they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other.

3. That under s-s. 2 of s. 91, B. N. A. Act, 1867, "regulation of trade and commerce," the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the court has no right whatever to enquire what motive induced Parliament to exercise its powers. (Henry, J., dissenting.)

The Mayor, etc., of Fredericton v. The Queen.—iii. 505.

6. Warehouse receipts—Ss. 46, 47 & 48 of 34 V. c. 5 (D.), *intra vires*.
See WAREHOUSE RECEIPTS, 2.

Parliament of Canada—Continued.

7. 38 V. c. 47, giving power to police and stipendiary magistrates to try offences in a summary manner, *intra vires*.

See HABEAS CORPUS, 2.

8. *Jurisdiction given to Vice-Admiralty Courts to enforce penalties for illegal distilling*—31 V. c. 8, s. 156, *Dominion Inland Revenue Act, 1867, intra vires*.

So much of s. 156 of the Inland Revenue Act, 1867, (31 V. c. 8) as gives the Court of Vice-Admiralty jurisdiction in prosecutions for penalties and forfeitures incurred thereunder, is *intra vires*, notwithstanding such court is established in Canada by Imperial authority. *Valin v. Langlois*, 3 Can. S. C. R. 1, 5 App. Cas. 115, discussed and followed.

Attorney General of Canada v. Flint.—16th Jan., 1884.—xvi. 707.

9. The Liquor License Act, 1883, and Act amending same, *ultra vires*.

See LIQUOR LICENSE ACT, 1883.

10. Act incorporating the Anticosti Company—Vendor to company estopped from questioning validity of, after judgment in litation.

See SALE OF LAND, 26.

11. *Winding-up Act*—R. S. C. c. 129, s. 3—*Foreign corporations*.

Section 3 of "The Winding-up Act," R. S. C. c. 129, which provides that the Act applies to * * * incorporated trading companies doing business in Canada wheressoever incorporated is *intra vires* of the Parliament of Canada.

Allen v. Hanson. In re The Scottish Canadian Asbestos Company.—xviii. 667.

12. *Right of legislation—Banking and incorporation of banks—Bankruptcy and insolvency*—31 V. c. 17 (D.)—33 V. c. 40 (D.)—*Validity of—B. N. A. Act, s. 91—Crown lands—Exemption from taxation*—R. S. O. 1887, c. 193, s. 7, ss. 1.

In 1866 the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 V. c. 17, the Dominion Parliament incorporated said trustees giving them authority to carry on the business of the bank so far as was necessary for winding up the same. By 33 V. c. 40 all the property of the bank vested in the trustees was transferred to the Dominion Government who became seized of all the powers of the trustees.

Held, affirming the judgment of the Court of Appeal for Ontario that these Acts were *intra vires* of the Dominion Parliament.

Parliament of Canada—Continued.

Per Ritchie, C.J., that the legislative authority of the Parliament over "banking and the incorporation of banks" and over "bankruptcy and insolvency" empowered it to pass the said Acts.

Per Strong, Taschereau and Patterson, JJ., the authority to pass the said Acts cannot be referred to the legislative jurisdiction of Parliament over "banking and the incorporation of banks" but to that over "bankruptcy and insolvency" only.

After the property of the bank became vested in the Dominion Government a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale.

Held, affirming the judgment of the Court of Appeal, that the Crown having a beneficial interest in the land it was exempt from taxation as Crown lands. R. S. O. 1887, c. 193, s. 7, s.s. 1.

Quirt v. The Queen.—xix. 510.

13. B. N. A. Act, s. 92, s-s. 14—Jurisdiction of provincial courts—C. S. (B.C.), c. 25, s. 14, and 53 V. c. 8, s. 9, (B. C.), *intra vires* of Provincial Legislature—51 V. c. 47, (D.)—(The Speedy Trials Act)—Meaning of "Any judge of a county court"—Said Act not an Act conferring jurisdiction, but an exercise of the power of Parliament to regulate criminal procedure.

See LEGISLATURE, 28.

CONSTITUTIONAL LAW.

Parties—Want of—In action to recover monies deposited in bank to credit of succession.

See BANKS AND BANKING, 4.

2. Death of party after verdict and before judgment on rule for new trial—Suggestion of death—Judgment *nunc pro tunc*—Appeal by executors.

See APPEAL, 18, 83.

And see PRACTICE OF SUPREME COURT, 10, 120, 121.

Partition—*Partition and inventory, between co-heirs, action to annul for fraud and concealment—Compromise, deed of—Action to set aside for fraud and coercion.*

Two appeals with titles almost identical, argued together, numbered 123 and 449 respectively.

The former of these cases is an action by one Jane Charlebois, wife of Dosithée Allard, to set aside a *partage* of the intestate succession of her late

Partition—Continued.

brother Arsène Charlebois, to which she was a party, and bearing date the 4th of November, 1870.

The action was taken out on the 4th of June, 1879, after the marriage of Jane Charlebois to Allard. It set up that the inventory was made by the appellant Hyacinthe Charlebois, that he had all his late brother's property in his hands, that he and his brother Arsène were co-partners, under a deed of partnership, and that in fact the other members of the family had trusted him entirely in all the matters relating to the estate. That being so trusted he had taken the opportunity to defraud and cheat his co-heirs, and particularly by representing that he had an equal share in the business as partner of his late brother; that he had not accounted for the capital invested by his brother; that he had undervalued the goods, possessed himself of the ready money and debts, and had augmented the liabilities of the partnership. As to the real estate he had fraudulently estimated it at less than half its real value. That he had affected to buy the shares of his two sisters, who had no rights, as they were civilly dead, being nuns of an order which prevented them from holding property, and that he had offered to give up the advantages arising from this transaction in order to induce the rest of the family to agree to the *partage* he was desirous of making. The other members, and particularly respondent, were induced by the false representations to agree to the *partage*.

It was also alleged that this inventory was not regularly made according to law, inasmuch as one of her sisters was a minor, and that there had been no *expertise* or curator appointed, and that therefore the whole proceeding was null, and should be set aside.

The conclusions of the action were that the inventory and the deed of *partage* should be set aside as fraudulent and null, that the defendant should be condemned to make a new inventory of the effects of the partnership, and that there should be a new inventory of the other property and effects of the succession, and a new *partage* of the whole.

The action was principally directed against Hyacinthe; the other members of the family were made parties to be subject to the new inventory and *partage*.

On the 19th November, 1879, the Superior Court (Mackay, J.,) set aside the inventory and partition of the estate of the late Arsène Charlebois on the ground of fraud, concealment and *recel*, practiced by Hyacinthe Charlebois. This judgment was appealed to the Court of Queen's Bench. Pending this appeal Hyacinthe Charlebois made with the defendant Allard and plaintiff, on the 5th of May, 1880, a deed entitled "Compromise between Dame Jane Charlebois, wife of Dosithée Allard, and Hyacinthe Charlebois," by which in consideration of the sum of \$700, paid to the plaintiff, and the costs of plaintiff in said cause until judgment and those of appeal paid to the attorneys, the plaintiff desisted from, and renounced to her judgment obtained as aforesaid, and assigned and transferred to the said defendant H. Charlebois all the rights she might have and claim in the estate of the said Arsène Charlebois, her brother, and in the estate of her father, Arsène Charlebois, senior.

The case No. 449 was an action by Jane Charlebois to set aside the deed of compromise for *crainte*, error and fraud. She contended that she was

Partition—Continued.

intimidated by her husband, who was on the point of leaving the country with another woman, into passing this deed with the object on his part of procuring for him the money to run off with this other person, and she affirmed that the money was never paid to her but to her husband.

The Superior Court annulled the said deed of compromise of the 5th of May, 1880, and restored the parties to the same position which they occupied previously to the said deed, reserving to defendant Charlebois his recourse to be reimbursed what he paid by virtue of this deed.

In case No. 128 the Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and dismissed the action, and in case 449 also it dismissed the action, on the ground that the plaintiff received the consideration money for the deed, which could not be set aside unless she brought back all she received under it.

On appeal to the Supreme Court of Canada, **Held**, that the judgments of the Court of Queen's Bench should be affirmed. The evidence did not establish fraud, or undue influence, or pressure in the execution of the deed of compromise, and the compromise being ineffectually assailed both appeals must fall together and stand dismissed. Fournier and Henry, JJ., dissenting.

Appeals dismissed with costs.

Charlebois v. Charlebois.—12th January, 1885.

Partnership.—Articles of—Construction of—Partners, rights of.

The respondents, having on hand large contracts to fulfil entered into partnership with the appellant under the style of J. W. & Co. The respondent A. P. M. subsequently filed a bill in Chancery against W. (the appellant) and his two sons co-partners, asking for a decree declaring him and his two sons entitled to receive credit to the amount of \$40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the Province of Quebec, under which the respondent claimed to be entitled to credit of \$40,000, is as follows:—"The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works by the said parties of the first part A. P. M. & Sons; also all quarries, steam tugs, scows, and also all the rights in said quarries that are held by the said parties of the first part, or any of them, the whole of which is valued at the sum of \$40,000, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses, appliances, steam tugs, scows, quarries and other items have been heretofore sold by the said party of the first part to the firm of M. & W., of the city of Montreal, hardware merchants, to secure them certain claims which they had against the said A. P. M. & Co., for moneys used in the construction of the works referred to, to the extent and sum of about \$24,000 and interest; and whereas the said J. W. has paid said amount of \$24,000 and redeemed said plant, tools, horses and appliances and quarries, steam tugs and scows, &c., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and

Partnership—Continued.

appliances that are or may be put on the said work shall be and continue to be the entire property of the said J. W., until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of \$24,000 and interest so advanced by him as aforesaid, as also any other sum or advances and interests which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm J. W. & Co., that is to say: That one-half thereof shall revert to and belong to the parties of the first part, and the other half to the said party of the second part, as the said J. W. has a full half interest in this contract and all its profits, losses and liabilities, and the said A. P. M., W. E. M. and R. M., parties of the first part, jointly and severally, the other half interest in the same." There was evidence that the plant had cost originally \$57,000, and that it was valued in the inventory at \$40,000 at the request of the appellant; it was also shown and admitted that the profits of the business were sufficient to reimburse the appellant the sum of \$24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership.

Held, Henry and Gwynne, JJ., dissenting, that the plant, etc., furnished by the respondents having been inventoried and valued in the articles of partnership at \$40,000, the respondents had thereby become creditors of the partnership for the said sum of \$40,000, but as it appeared by the said articles of partnership that the said plant was subject at the time to a lien of \$24,000, and that the said lien had been paid off with the partnership moneys, the respondents were only entitled to be credited, as creditors of the partnership, with the sum of \$16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership.

Worthington v. MacDonald.—ix. 327.

2. *Joint purchase of debentures—Interest in margin deposited—One partner withdrawing from bank more than his share of margin obliged to reimburse the other partner in the transaction.*

The facts, as stated in the judgments rendered are as follows:—In May, 1876, the defendant authorized one McCord, his broker, to bid for city of London debentures, amounting to \$220,000, then about to be issued, and in the purchase of which the defendant did not wish his name to appear; McCord accordingly bid for them, and his bid of 98½ per cent. was accepted. When bidding for them McCord was under the impression that he was doing so for the defendant, although McCord's name was put forward as purchaser. The defendant, however, was only willing to take a half interest in the debentures. In order to secure them it was necessary to raise the sum of \$219,486 to pay for them. Negotiations for this purpose took place between McCord and different banks, and at one time it was thought these negotiations would be completed with the Bank of Montreal upon the deposit of \$13,000 by way of margin, together with the debentures themselves when obtained, and an

Partnership—Continued.

agreement as to their sale. McCord appears to have had difficulty in raising the one half of the \$13,000. The defendant, after being written to by McCord and seeing him on the subject, gave him a cheque for \$3,250 with a paper containing the following directions: "Please apply \$3,250 out of the balance in your hands due to me along with cheque for \$3,250 on Molson's Bank of this date, making in all \$6,500, as margin on my half of transaction of City of London debentures." In return, he took from McCord his receipt in the terms following: "Received from Major Walker the sum of \$6,500, being his proportion of margin on \$219,486, city of London debentures, bought on joint account." At this time it was expected that the amount required for margin would be \$13,000. It was understood between defendant and McCord that the latter was to do the best he could to obtain the amount necessary to secure the debentures. He accordingly applied to the plaintiff to become the purchaser of a half interest, informing him that the defendant would be interested in the other half, and as the defendant had said he did not wish his name to appear in the transaction, McCord requested the plaintiff to keep to himself the information of the appellant being interested. The plaintiff agreed to become purchaser of the half, leaving the negotiations for raising the loan from one of the banks to McCord. The negotiations with the Bank of Montreal having fallen through, an arrangement was eventually completed with the Canadian Bank of Commerce (\$10,000 of a margin to be paid) by a letter to the manager, signed by the plaintiff on his own behalf, and by McCord in his own name, but for the defendant. The \$10,000 of margin was paid by plaintiff out of his own moneys, but one-half (\$5,000) was reimbursed to him by McCord. Upon the close of the transaction by sale of the debentures there remained in the bank of the margin of \$10,000 so paid as above the sum of \$6,600. McCord having become insolvent, the defendant succeeded in procuring the bank to pay him 65 per cent. of this balance upon the pretence that he was interested to that amount because of his having McCord's receipt for \$6,500 above mentioned.

The Court of Chancery, and subsequently the Court of Appeal for Ontario, held that this payment by the bank to the defendants was not authorized, but the defendant and plaintiff having been interested in the bonds jointly, and, after repayment to the plaintiff of the one-half of the \$10,000, having been also interested jointly in the amount in the bank to the credit of the margin, was entitled to be reimbursed by the defendant, the sum required to make up the half of the amount so remaining to the credit of the margin.

On appeal to the Supreme Court of Canada, Held, that the judgments of the courts below should be affirmed.

Appeal dismissed with costs.

Walker v. Cornell.—12th February, 1881.

3. *Contractors, partnership between—Nature of contract—Interest in sub-contract—Rejection of tenders at fraudulent instigation of some of the partners—Damages.*

This action was instituted on the 24th January, 1878, by Robert Kane, of Montreal, contractor, against Augustus R. Wright, of Geneva, in the State of

Partnership—Continued.

New York, and Edward Moore, of Portland, in the State of Maine, contractors, claiming from them \$25,000 for breach of contract.

A summary of the complaint contained in the declaration may be stated in brief as follows:—

In January, 1877, the Quebec Harbour Commissioners advertised for tenders for the performance of a large amount of public works at the mouth of the St. Charles River, for the improvement of the harbour of Quebec.

The plaintiff, the defendants, and Angus P. Macdonald, of Montreal, contractor, associated themselves together as partners, under the firm of Moore, Wright & Co., to tender, contract for and execute the said works for the common profit of said partners, share and share alike. It was proposed and agreed by and between them that they should each and all exert themselves to secure the contract for the performance of the whole of the said works if possible, but if that were not possible to secure so much thereof as could be obtained either by direct contract with the commissioners, or by sub-contract with the successful tenderer, or in such other manner as the same might be obtainable, more especially the contract for that part of the said works which consisted of dredging. The plaintiff procured the necessary information to enable tenders to be made for said works, by and in the name of said firm of Moore, Wright & Co., exerted himself to promote their success, and kept the defendants informed of the progress of events connected with the letting out of the said work by tender. A tender was in consequence made for said work by and in the name of said firm of Moore, Wright & Co., and at the request of said harbour commissioners a supplementary tender was likewise made in their name, but the defendants seeing that the commissioners favoured Simon Peters, of Quebec, contractor, and were disposed in case he reduced his prices, to give him the contract for said works, the defendants, in violation of their said partnership agreement with the plaintiff and said Angus P. Macdonald, combined with said Simon Peters, in order to secure part of the works through him, and for that purpose communicated to him the prices at which they were willing to perform the dredging, which were much beneath the prices of the said Simon Peters for said work, which enabled him so to lower his tender, that the work was, through him, awarded and given by contract to a firm composed of the defendants and the said Simon Peters, under the name of Peters, Moore & Wright. To enable this to be done the defendants had actually withdrawn the tenders of the firm of Moore, Wright & Co., and fraudulently secured the contract to the firm of Peters, Moore & Wright, with the understanding that the defendants would have the performance of and the profits resulting from the larger portion of said work, especially the dredging, to the exclusion, and in prejudice of the rights of the plaintiff and of the said Angus P. Macdonald.

After the defendant had so secured the greater part of said works they offered participation therein and of the profits thereof to the plaintiff, and to the said Angus P. Macdonald, which they accepted, yet the defendants failed and refused to fulfil their offer. The plaintiff had always been willing, and offered to perform his part of the agreement, and was entitled to one-fourth of

Partnership—Continued.

the advantages and profit resulting from said contract, and the performance of the works thereunder.

The said contract was for a sum exceeding \$500,000, and the prospective profits were presently worth \$100,000, whereof the plaintiff was entitled to one-fourth or, \$25,000, for which he brought his action.

The defendants by their plea admitted that they made their first, as well as a supplementary, tender, in conjunction with the plaintiff and with said Angus P. Macdonald, but denied that said tenders were ever withdrawn, and averred that they were not successful, and that no part of the work was or could be secured thereunder, and they had a perfect right to combine with and secure the work through said Simon Peters, that it was in fact awarded to him, and not to him and the defendants jointly, but Peters agreed to sub-let the dredging and concrete work to them, the defendants, but it was nominally arranged that they should be joint contractors with the harbour commissioners, and by agreement with Peters they would divide and separate the part of the work by the dredging and concrete work to be done by them, and this separation was actually effected by notarial contract, that they were in good faith in procuring the work through Peters, and were under no obligation whatever to allow the plaintiff or said A. P. Macdonald to participate in their contract; nevertheless, they had offered to do so, but the plaintiff and said Macdonald had failed to accept within reasonable time, and they were obliged to act independently for themselves.

The principal contention was whether the partnership obligation of the defendants was limited to the tenders put in by them in conjunction with the plaintiff and Angus P. Macdonald.

The Superior Court adopted the view that the evidence showed they were so limited and that the defendants had not fraudulently or otherwise obtained the rejection of said tenders, and dismissed Kane's action.

On appeal to the Court of Queen's Bench for Lower Canada (appeal side) that court *Held*, on a review of the evidence, that the agreement between plaintiff and defendants was that they should be jointly interested, not only in the profits of the entire work, but in such portion of it as could be secured either directly or by sub-contract; that the defendants in fraud of the plaintiff, procured the contract for the execution of a large proportion of the works in conjunction with Peters; that the defendants afterwards offered a share in the contract to plaintiff and Macdonald, which offer was accepted, but which the defendants refused to carry out; and the court reversed the judgment of the Superior Court and awarded the plaintiff \$2,500.

On appeal to the Supreme Court of Canada, *Held*, that the judgment of the Court of Queen's Bench should be affirmed. Taschereau, J., dissenting.

Appeal dismissed with costs.

Wright v. Kane.—28th April, 1882.

4. *Partners—Giving time to principal—Blended accounts—Payments.*

Hutton and McGuire (defendants), trading together in partnership, became indebted to Birkett, *et al.*, plaintiffs, for goods purchased from them,

Partnership—Continued.

for which the defendants gave notes of the partnership firm. They dissolved partnership in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging the dissolution.

McGuire continued to carry on the business alone, and the plaintiffs continued to deal with him. In so doing McGuire had several transactions with the plaintiffs, from whom he continued to receive goods on credit, until he became insolvent, in the early part of the year 1880, whereupon plaintiffs brought this action on the note given by the firm. The circumstances attending the dissolution of the firm of McGuire and Hutton, and the subsequent dealings of the plaintiffs with McGuire, appear at length in the report of the case in 31 U. C. C. P. 480 and 7 Ont. App. R. 33.

Held, reversing the judgment of the Court of Appeals, Ritchie, C.J., and Strong, J., dissenting, that Hutton was entitled to a verdict on the ground that by the course of dealings of the plaintiffs with McGuire subsequently to the dissolution, viz.: by plaintiffs blending the two accounts, and taking McGuire's paper on account of the blended accounts, upon which paper McGuire from time to time made sufficient payments to pay any balance remaining due on the paper of McGuire and Hutton which was in existence at the time of the dissolution, it must be held as a matter of fact, as well as of law, arising from the course of the said dealings, that the paper of the firm of McGuire and Hutton had been fully paid.

Appeal allowed with costs.

Birkett, et al. v. McGuire (19 C. L. J. 273).—19th June, 1883.

5. Tender for contract by individual member of firm—Right of action.

See CONTRACT, 24.

6. *Suretyship—Contract of, with firm—Continuing security to firm and member or members constituting firm for the time being—Death of partner—Liability of surety after.*

S., by indenture under seal, became surety to the firm of C. & Sons for goods to be sold to one Q., and agreed to be a continuing security to the said firm or "to the member or members for the time being constituting the said firm of C. & Sons," for sales to be made by the said firm or "any member or members of the said firm of C. & Sons," to the said Q., so long as they should mutually deal together.

P. C., the senior member of the said firm, having died, and by his will appointed his sons, the other members of the firm, his executors, the latter entered into a new agreement of co-partnership and continued to carry on the business under the same firm name of C. & Sons, and subsequently transferred all their interest in the said business to a joint stock company.

An action having been brought against S. for goods sold to Q. after the death of the said P. C., Held, reversing the judgment of the Court of Appeal 11 Ont. App. R. 156, and restoring the judgment of the Common Pleas Divi-

Partnership—Continued.

sion, 5 O. R. 189, that the death of P. C. dissolved the said firm of C. & Sons, and put an end to the contract of suretyship.

Starrs v. The Cosgrave Brewing and Malting Co. of Toronto.—xii. 571.

7. *Interest in mine—Agreement as to—Evidence.*

Held, affirming the judgment of the Supreme Court of Nova Scotia, that in a suit for a share of the profits of a gold mine where the plaintiff relied on an agreement by the defendant for a transfer of a portion of the latter's interest in such mine for valuable consideration, the evidence was not sufficient to establish a partnership between the parties in the working of the mine and the suit was dismissed.

Stuart v. Mott.—May 17th, 1886.—xiv. 734.

8. *Quebec Pharmacy Act, (Q.) c. 36, s. 8—Partnership—Mandamus.*

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada, M. L. R. 2 Q. B. 362, that s. 8 of 48 V. c. 36 (Q.), which says that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising, are entitled to be registered as licentiates of pharmacy, applies to respondent who had, during more than five years before the coming into force of the said Act, practised as chemist and druggist in partnership with his brother and in his brothers name, and therefore he (respondent) was entitled under s. 8 to be registered as licentiate of a pharmacy.

L'Association Pharmaceutique de la Province de Quebec v. Brunet.

—March 14, 1887.—xiv. 738.

9. *Liability of one partner for prior debt of co-partner—Promissory note—Collateral for partnership debt—Release of maker.*

P. lent N. an accommodation note which N. deposited with R. as collateral security for a mortgage debt. N. and B. afterwards went into partnership and a new mortgage on partnership property was given to R. for N.'s debt, the note being still left with R. The partnership being dissolved, B. agreed to pay all debts of the firm, including the mortgage, and in settling the accounts between himself and the mortgagees, B. was given credit for the amount of the note which P. had paid to the mortgagees. P. sought to recover from B. the amount so paid.

Held, reversing the judgment of the court below, Ritchie, C.J., and Fournier, J., dissenting, that N. having authority to deal with the note as he pleased, and having given it as collateral security for the joint debt of himself and B., on such security being realized by the mortgagees and the amount credited on the joint debt, P., the surety, could recover it from either of the debtors.

Semble,—Assuming P. not to have been liable to pay the note to the mortgagees and that it was a voluntary payment, it having been credited on

Partnership—Continued.

the mortgage debt, and B. having adopted the payment in the settlement of the accounts between him and the mortgagee, he was liable to repay it.

Purdom v. Baechler.—xv. 610.

10. Evidence of—Letter heads—Names of partners on.

See EVIDENCE, 41.

11. Contract—Mining land—Speculation in—Agreement with third party—Renewal—Effect of.

T., being in Newfoundland, discovered a mine of pyrites, and on returning to Nova Scotia he proposed to A. that they should buy it on speculation. A. agreed, and advanced money towards paying T.'s expenses in going to Newfoundland to secure the title. T. made the second journey and obtained an agreement of purchase from the owner of the mine for a limited time, but failing to effect a sale within that time the agreement lapsed. It was renewed, however, some two or three times, A. continuing to advance money for expenses. Finally, T. effected a sale of the mine at a profit and had the necessary transfers made for the purpose, keeping the matter of the sale secret from A. On an action by A. for his share of the profit under the original agreement.

Held, affirming the judgment of the court below, that the sale related back, as between T. and A., to the date of the first agreement, and A. could recover.

Present.—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Tupper v. Annand.—Mar. 18, 1889.—xvi. 718.

12. Action for partition—Plaintiffs' interest less than \$2,000—S. & E. C. Act, R. S. C. c. 135, s. 29.

See JURISDICTION, 70.

13. Loan to Partner—Liability—Art. 1867, C. C.

Where once a member of a partnership borrows money upon his own credit by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business of his own free will without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for such a loan under Art. 1867, C. C. *Maguire v. Scott*, 7 L. C. R. 451, distinguished.

Shaw v. Cadwell.—xvii. 357.

14. Terms of—Breach of conditions—Expulsion of one partner—Notice—Waiver—Goodwill.

Partnership articles for a firm of three persons provided that if any partner should violate certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of

Partnership—Continued.

the goodwill of the business. One of the partners having broken such conditions of partnership the others verbally notified him that he must leave the firm and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business and the assignee brought an action against the remaining partners for the value of the same.

Held, reversing the judgment of the court below, Fournier, J., dissenting, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from showing that it took place in consequence of the misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to expel could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited.

Held, also, that if it was a dissolution by one partner voluntarily retiring no claim could be made by the retiring partner in respect to goodwill, as the account to be taken under the partnership articles in such cases does not provide therefor.

Semble, that the goodwill consisted wholly of the trade name of the firm.

O'Keefe v. Curran.—xvii. 596.

15. *Buying and selling land—Stock-in-trade—Banker—Payment of cheque—Joint payees—Indorsement by one—Acquiescence in payment—Monthly receipts.*

When a partnership is entered into for the purpose of buying and selling lands, the lands acquired in the business of such partnership are, in equity, considered as personalty, and may be dealt with by one partner as freely as if they constituted the stock-in-trade of a commercial partnership.

The active partner in such business has an implied authority to borrow money on the security of mortgages acquired by the sale of partnership lands.

An amount so borrowed was paid by a cheque made payable to the order of all the partners by name. The active partner had authority, by power of attorney, to sign his partners' names to all deeds and conveyances necessary for carrying on the business, but had no express authority to endorse cheques.

Held, that having authority to effect the loan and receive the amount in cash he could endorse his partners' names on the cheque, and the drawees had a right to assume that he did it for partnership purposes and were justified in paying it on such endorsement.

Held, also, that if the payment by the drawees was not warranted the drawers having, for two years after, received monthly statements of their account with the drawees, and given receipts acknowledging the correctness of the same, they must be held to have acquiesced in the payment.

Manitoba Mortgage Co. v. The Bank of Montreal.—xvii. 692.

Partnership—Continued.**16. Fraud against partners—Use of firm name—Promissory note—Authority to sign—Notice to person taking.**

E. was a member of the firm of S. C. & Co. and also a member of the firm of E. & Co., and in order to raise money for the use of E. & Co. he made a promissory note which he signed with the name of the other firm and indorsing it in the name of E. & Co. had it discounted. The officers of the bank which discounted the note knew the handwriting of E. with whom the bank had had frequent dealings. In an action against the makers of the note, C. pleaded that it was made by E. in fraud of his partners and the jury found that S. C. & Co. had not authorized the making of the note, but did not answer questions submitted as to the knowledge of the bank of want of authority.

Held, reversing the judgment of the court below, that the note was made by E. in fraud of his partners and that the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority. Not having made such inquiry the bank could not recover against C.

Creighton v. Halifax Banking Co.—xviii. 140.

17. Solicitor allowing his name to appear as member of a firm of solicitors—Not estopped from showing that he was not such member and was not in fact practising—R. S. O. 1877, c. 140.

See SOLICITOR, 1.

18. Partnership—Dissolution—New partnership by continuing partner—Liability of new firm—Right of third person to enforce—Trust—Novation.

A firm consisting of two persons dissolved partnership, the retiring partner receiving a number of promissory notes in payment of his share in the business which notes he indorsed to the plaintiff H. The continuing partner of the firm afterwards entered into a partnership with O., the defendant, and transferred to the new firm all the assets of his business, his liabilities, including the above mentioned promissory notes, being assumed by the co-partnership and charged against him. The new firm paid two of the notes and interest on others, and made a proposal for an extension of time to pay the whole which was not entertained.

Held, reversing the decision of the Court of Appeal (17 Ont. App. R. 456, *sub-nomine Henderson v. Kulley*), and of the Divisional Court (14 O. R. 137), Fournier, J., dissenting, that the agreement between the continuing partner and the defendant did not make the defendant a trustee of the former's property for the payment of his liabilities, and the act of the defendant in paying some of the notes did not amount to a novation as it was proved that plaintiff had obtained and still held a judgment against the maker and endorser of the notes in an action thereon and there was no consideration for such novation.

Present:—Sir W. J. Ritchie, C.J., and Fournier, Taschereau, Gwynne, and Patterson, JJ.

Osborne v. Henderson.—14th June, 1889.—xviii. 698.

Partnership—Continued.

19. Style of firm—Name of individual member—Note made in firm name—Dissolution—Liability of firm.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES, 23.**

20. Sale of goods—Partners—To whom credit given—Entries of other goods on previous dealings—Evidence of partnership—New trial unless consent given to reduction of verdict.

See **EVIDENCE, 63.**

21. *Dissolution of—Carrying on business under different name from that originally agreed upon—Acquiescence by partners.*

Bill of complaint in this cause was filed on the 28th of May 1884 by the plaintiff Edward P. Leacock setting out that he and the defendants Peter McLaren, John G. Haggart, and John Shields, entered into partnership as lumbermillers and sawmillers in the spring of 1881, and that a written agreement was shortly thereafter entered into. By this agreement dated the 10th February 1881 it is recited that the parties owned certain timber limits on Shell River in certain proportions and it was agreed that they were to provide the means for the erection of a saw mill and for procuring a plant and supplies for the working of the said mill; a quantity of saw logs being then in process of being got out for the purpose of being sawn at the mill. (This mill was afterwards erected at Brandon instead of Shell River). They were to contribute equally for these purposes and to share equally in the profits; they were to appoint a manager who was to make a requisition for money which each party was to supply equally; it was agreed that as soon as practicable, they should form themselves into a joint stock company limited, which company should be known as the North West Milling Company, limited, and that in the mean time the business of the said parties should be conducted under the name of the North West Milling Company. The capital should not exceed the sum of \$12,000 without the consent of all parties; that no one without the consent in writing of the others should make and contract in the name of the company except so far as might be necessary for the purchase of supplies or transporting material. There was provision made for building the mill and for carrying on the business until the incorporation should be obtained.

The plaintiff alleged that the respondents McLaren and Haggart refused to carry out the said agreement or to put up the capital, and he prayed that the ordinary partnership accounts should be taken and a receiver appointed.

The defendant Shields in his answer admitted the partnership, and stated the business of the partnership was carried on by the plaintiff Leacock under the different names of Leacock, McLaren & Co., Shields and Leacock, Leacock and Shields, and Shields and Company, and that he (Shields) and the defendants McLaren and Haggart were cognizant of the same during the carrying on of the said business, and from time to time recognized the same, and he further stated that the business became financially embarrassed in the summer of 1883, and acting for himself and at the request of the defendants Mc-

Partnership—Continued.

Laren and Haggart, though only in his own name, he and the plaintiff Leacock consented to the appointment of a manager of the business and advertised in the ordinary way that the firm of Shields and Company, under which name the business was running, was mutually dissolved. And he further alleged that the incorporation of the company above mentioned was prevented by the respondents McLaren and Haggart, and he assented to the taking of the partnership accounts.

The answer of the defendants McLaren and Haggart set out the said agreement in full and alleged that they never entered into any agreement of partnership with the plaintiff Leacock or the defendant Shields, other than the one set out. They charged the plaintiff Leacock with several acts of misconduct, conversion of money to his own use, of refusal on his part in the year 1881 to give any account of the business of the partnership during the said year, and that he refused to give any account until after the formation of the firm of Shields and Company. They charged that on or about the month of November, 1881, the plaintiff Leacock and the defendant Shields in fraud of the partnership and of the defendants McLaren and Haggart, and with the intent and design of depriving the said last mentioned defendants of their just rights formed a new firm under the name of Shields and Company, of which firm they charge the fact to be that the plaintiff Leacock and the defendant Shields, and no other persons were members, and under the said firm name of Shields and Company, proceeded to get out, and did get out large quantities of saw logs upon the limits belonging to the said firm of the North West Milling Company, and converted the same into lumber at the said saw mill, and converted the lumber, proceeds thereof, into money, which they appropriated to their own use. The defendants McLaren and Haggart denied that they ever became members of the firm of Shields and Company, or ever consented to the operations of the firm of Shields and Company, and also refused to have anything to do with it, and they claimed that the plaintiff Leacock and the defendant Shields should account to them for the values of the properties of the North West Milling Company used by Leacock and Shields. They denied all charges of the breach of the partnership agreement, and said they were willing to perform the same until they discovered the extravagant conduct of the plaintiff and his reckless violation of the agreement. They claimed that the plaintiff Leacock and the defendant Shields incurred large liabilities and attempted to encumber by chattel and other mortgages, the property of the partnership and asked to be indemnified against the same, and finally after asking damages of the plaintiff and the defendant Shields, submitted to an account of the North West Milling Company.

The case came on for trial before Wallbridge, C.J. The evidence was very voluminous, and as the result the court held, that the defendants McLaren and Haggart prevented the incorporation of the defendants and the plaintiff under the name of the North West Milling Company and were liable to the defendant Shields and the plaintiff Leacock for such damages as they might prove to have been occasioned thereby; that up to the 15th December, 1881, the business carried on was that of the North West Milling Company, composed of the plaintiff and defendants; that subsequent to the said 15th December, 1881, the business was that of the plaintiff alone; that

Partnership—Continued.

the mill and property were the property of the plaintiff and defendants; that the defendants never were nor was any of them, members or a member of the firm of Leacock, McLaren & Company, or Shields and Company, or any combination of the name of Shields, used by the plaintiff in carrying on said business at any time either before or after the said 15th December, 1881; 2. that as between the parties, McLaren and Haggart and Shields were not chargeable with the liability of Shields and Company or of the plaintiff arising out of the business carried on by the plaintiff in connection with the Shell River limits or Brandon mill from and after the 15th December, 1881; that the defendants had a right to elect whether they would recognize or assume the business carried on by the plaintiff or claim payment for the partnership property used by him as from the 15th December, 1881, and that they had elected to claim such payment from the plaintiff from said last mentioned date, and that *inter se* the defendants were not partners with the plaintiff from that date; that any monies which the defendant Shields might have paid or might pay in consequence of the carrying on of the business since the 15th December, 1881, were a charge on the interest of the plaintiff and the proceeds and assets of the business carried on by him since the beginning of the partnership formed between the parties; that the defendants were entitled to have the plaintiff charged on his partnership account with their value of their three shares of all the logs and timber cut upon the partnership timber limits and with the net value of the logs and lumber of the partnership cut and manufactured by the North West Milling Company on and prior to the 15th December, 1881, and used by the plaintiff on and after that date, and also with the use of the defendant's undivided interest in the said saw mill property at Brandon; and a reference was directed to the master to take the accounts, the defendants to have a first lien on the assets of the plaintiff in connection with the North West Milling Company for the amount found due to them respectively; that the plaintiff should pay to the defendants, respectively their costs of the suit, such costs to be charged to the plaintiff, and credited to the defendant, in taking the accounts as an additional remedy for the recovery of such costs. And further directions were reserved with liberty to apply.

The cause was reheard at the instance of the defendants McLaren and Haggart, the plaintiff also giving notice of rehearing before Dubuc, Taylor, and Killam, JJ., who agreed in finding that McLaren and Haggart were in fault in preventing the incorporation of the partnership as found by the Chief Justice, but Taylor and Killam, JJ., came to the conclusion that the business carried on subsequently to the 15th December 1881 was the business of the plaintiff and the defendant Shields, instead of the business of the plaintiff alone, and the decree was therefore varied to work out, on this basis, the liabilities as between the plaintiff and Shields on the one part and McLaren and Haggart on the other, and also as between the plaintiff and Shields.

Mr. Justice Dubuc dissented from the judgment of his brother judges being of opinion that as regards Leacock and the defendant Shields, no fraud whatever could be imputed to them; that if there had been any concealment or misrepresentation, it had been on the part of the defendants McLaren and Haggart, who by their conduct, acquiescence and actions misled Leacock and Shields, making them believe that they were willing partners of the business

Partnership—Continued.

under the name of Shields and Company, or other combination of that kind. He thought the decree should declare all the parties to the suit partners in the business no matter what name it was carried on under, and that as McLaren and Haggart had charged fraud and had failed to prove it, and were the cause of the suit, they should bear the costs up to the conclusion of the hearing and also the cost of rehearing.

The defendant Shields appealed to the Supreme Court of Canada, and the plaintiff Leacock gave notice that upon such appeal he also would ask for a variation of the decree of the Court below.

The Supreme Court, **Held**, *per* Fournier, Gwynne and Patterson, JJ., (Strong and Taschereau, JJ. dissenting,) that upon a consideration of the evidence as a whole and the inferences to be drawn therefrom the view taken by Dubuc, J., in the court below was correct, and that the original decree of the 19th of June 1885, should be varied by changing it into an ordinary partnership decree, regarding the partnership as existing until dissolved by the proceedings taken in the suit; that the defendants McLaren and Haggart should pay to the appellant his costs of appeal to the Supreme Court and that each party should pay the costs incurred by him subsequent to the decree of the 19th June, 1885, and prior to the commencement of the appeal.

Present :—Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Shields v. Leacock.—30th April, 1889.

[The Judicial Committee of the Privy Council granted leave to appeal in this case, but the case was settled by the parties before the appeal came on for hearing.]

Partus Sequitur Ventrem.

See CHATTEL MORTGAGE, 17

Patent.—*Dominion Lands Act, 35 V. c. 23, s. 33, s-ss. 7 & 8—Homestead Patent, validity of Bill—Equitable or statutory title—Demurrer—39 V. c. 23, s. 69.*

The plaintiff, in his bill of complaint, alleged in the 6th paragraph as follows:—"Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein, and procured proper affidavits, according to the statute, whereby he proved to the satisfaction of the Dominion lands agent in that behalf (and the plaintiff charges the same to be true), that the said defendant Farmer had never settled on or improved the said lands assumed to be homesteaded by him, or the lands herein in question, but had been absent therefrom continuously since his pretended homesteading and pre-emption entries, and thereupon the claim of the defendant Farmer under the said entries became and was forthwith forfeited, and any pretended rights of the defendant Farmer thereunder ceased, and the plaintiff thereunder, on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion lands agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit, according to Form A, mentioned in 35 V. c. 23, s. 33, and did make and swear to an affidavit according to Form B. mentioned

Patent—Continued.

in s. 83, s-s. 7 of the same Act, and did pay to the same agent the homestead fee of \$10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the statute and the regulations of the Department, and that the statute said: Upon making this affidavit and filing it, and on payment of an office fee of \$10 (for which he shall receive a receipt from the agent), he should be permitted to enter the lands specified in the application; and thereupon and in pursuance thereof, and in good faith, the plaintiff did forthwith enter upon said land and take actual possession thereof, and has ever since remained in actual occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate \$1,000. Demurrer for want of equity.

Held, reversing the judgment of the court below, and allowing the demurrer, that the plaintiff had no *locus standi* to attack the validity of the patent issued by the Crown to the defendant, as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of s. 69 or of s-s. 7 & 8 of s. 83 of 35 V. c. 23, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the Crown, or a sufficient allegation that the Crown was ignorant of the facts of plaintiff's possession and improvements. *Taschereau and Gwynne, JJ.*, dissenting.

Per Strong, J., that when the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot set up equities behind the patent.

Farmer v. Livingstone.—viii. 140.

2. Void, as having been improvidently granted.
See TRESPASS, 14.
3. Of land—Crown lands (Ont.)—License to cut timber—Right of patentee.
See CROWN LANDS, 2.
4. To C. P. Ry. Co.—Lands in N. W. T.—Exemption from taxation before issue of.
See STATUTE, 3.

Patent of Invention—Combination—Novelty—Inventor—Prior patent to person not inventor—Pleading and practice—S. 6, Patent Act, 1872—Use by others in Canada—Use by patentee in foreign countries—S. 28, Patent Act, 1872—Final decision—Judgment in rem—S. 7, Patent Act, 1872—Commencement to manufacture before application in Canada—S. 48—Use by defendant before patent.

An invention consisted of the combination in a machine of three parts, or elements, A, B and C, each of which was old, and of which A had been

Patent of Invention—Continued.

previously combined with B in one machine and B and C in another machine, but the united action of which in the patented machine produced new and useful results.

Held, 1. (Strong, J., dissenting) to be a patentable invention.

To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

2. The words in the 6th s. of the Patent Act, 1872, "not being in public use or on sale for more than one year previous to his application in Canada," are to be read as meaning "not being in public use or on sale in Canada for more than one year previous to his application."

3. That the Minister of Agriculture, or his Deputy, has exclusive jurisdiction over questions of forfeiture under the 28th s. of the Patent Act, 1872, and a defence on the ground that a patent has become forfeited for breach of the conditions in the said 28th section cannot be supported after a decision of the Minister of Agriculture or his Deputy declaring it not void by reason of such breach.

Per Henry, J., the jurisdiction of the commissioner is administrative rather than judicial, and he may look at the motive and effect of an act of importation, and a single act, such as the importation of a sample tending to introduce the invention, is not necessarily a breach of the spirit of the conditions of the 28th section. Under the 7th and 48th ss. of the Patent Act, 1872, persons who had acquired or used one or more of the patented articles before the date of the patent, or who had commenced to manufacture before the date of the application, are not entitled to a general license to make or use the invention after the issue of the patent.

As to the form of order in appeal, *see Practice of Supreme Court*, 109.

Smith v. Goldie.—ix. 46.

2. *Sale of—Specific performance—Agreement partly executed and partly executory—Construction of—Misrepresentation by vendor—32 & 33 V. c. 11, s. 17 (Patent Act)—Consolidation of suits.*

On 1st June, 1877, C. P., the owner of a patent for an improved pump which had only about a month to run, but was renewable for two further terms of five years each, agreed to sell to P. *et al.* his pump patent for five counties, and by deed of same date he granted, sold and set over to P. *et al.* "all the right, title, interest which I have in the said invention as secured by me by said letters patent for, to and in the said limits of the counties, of," etc. The *habendum* in the deed was "to the full end of the term for which the letters patent are granted. The consideration was \$4,500, of which \$1,500 was paid down, and mortgages given on the land on which the business was carried on, and on the chattels for the residue. The patent expired on the

Patent of Invention—Continued.

19th July, 1877, and C. P. renewed it in his own name for the further term of five years, and P. *et al.* having made default in June, 1878, C. P. filed his bill asking for payment of the balance of purchase money, or in default for a sale of the land. Almost at the same time P. *et al.* brought a suit against C. P. to enforce specific performance of the agreement for sale of the patent right for the full period to which C. P. was entitled to renew the same under the patent laws.

Held, in the suit *Peck, et al. v. Powell*, reversing the judgment of the Court of Appeal, that under the agreement and assignment plaintiffs were entitled to the extension as well as the current term.

And in the suit *Powell v. Peck, et al.*, affirming the judgment of the Court of Appeal, that C. P. was entitled to a decree for the redemption or foreclosure of the mortgaged premises with costs.

Per Strong, J., according to the principles upon which a court of equity acts in carrying into execution by its decree such contracts and agreements as are properly the subject of its jurisdiction, the court will always execute the whole or such parts of the agreement as remain executory, but if the parties have thought fit, before the institution of the suit, to carry out any of the terms of the contract, such executed portions will not be disturbed.

Per Henry and Gwynne, JJ., that the decrees in the Court of Chancery should be consolidated and the decree for sale in default of payment in the suit of *Powell v. Peck, et al.* delayed until P. had assigned the renewal term.

Peck v. Powell. } —xi. 494.
Powell v. Peck. }

3. *Assignment of interest—Subsequent infringement—Want of novelty.*

C. obtained a patent for The Paragon Black Leaf Check Book, and in his specification claimed as his invention, "in a black leaf check book of double leaves, one-half of which are bound together, while the other half fold in as fly leaves torn out: the combination of the black leaf bound into the book next the cover and provided with tape across its ends, the said black leaf having the transferring composition on one of its sides only."

A half interest in this patent was assigned to the defendant, with whom C. was in partnership, and on the dissolution of such partnership said half interest was re-assigned to C., who assigned the whole interest in the patent to plaintiffs.

Prior to the said dissolution the defendant obtained a patent for what he called "Butterfield's Improved Paragon Check Book," claiming as his invention the following improvements on check books previously in use: 1st. A kind of type; 2nd. The membrane hinge for a blank leaf the whole bound by an elastic band to the ends or sides of the lower cover; and, 3rd. A total-lining sheet. And after the dissolution proceeded to manufacture check books under his said patent. Plaintiffs brought suit for an injunction, claiming that their patent was infringed and, on the hearing before the Chancellor, he held the plaintiff's patent to be void for want of novelty.

Patent of Invention—*Continued.*

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the Court of Appeal, 11 Ont. App. R. 145, that the patent of the plaintiffs under which they claimed was a valid patent, and as there was no doubt that it was infringed by the manufacture and sale of defendant's books, the judgment of the Chancellor should be restored.

Grip Printing & Publishing Co. v. Butterfield.—xi. 291.

4. *Infringement — New invention — Combination — Want of novelty.*

A patent was obtained for a baker's oven, the patentee claiming as his invention the following:—

1. A fire pot, or furnace, placed within a baker's oven, below the sole thereof, and provided with a door situated above the grate.

2. A fire pot, or furnace, placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide.

3. In a baker's oven, a flue leading from below the grate to the main flue.

4. A baker's oven provided with a circular tilting grate, situated above the sole of the oven, and provided with a door.

5. In a baker's oven, a cinder grate placed beneath the fire grate, in combination with a flue leading from below the grate to the main flue.

And in the specifications the patentee says:—"What I claim as my invention is—in combination with a baker's oven a furnace set within the oven, but below the sole."

Held, affirming the judgment of the Court of Appeal 10 Ont. App. R. 449, Strong, J., dissenting, that the combination being a mere aggregation of parts not in themselves patentable, and producing no new result due to the combination itself, was no invention, and consequently could not form the subject of a patent.

Hunter v. Carrick.—xi. 300.

5. *Combination — Subsequent patent — Scire facias — Infringement — Damages, measure of.*

On the 4th July, 1877, Lasnier, the respondent, obtained from the patent office a patent of invention for new and useful improvements in candle making apparatus. In 1879, C., who was also engaged in the same trade, obtained a patent for a machine to make candles. L. claimed that C.'s patent was a fraudulent imitation of his patent, and prayed that C. be condemned to pay him \$13,200 as being the amount of profits alleged to have been realized by C. in making and selling candles with his patented machine, and also \$10,000 exemplary damages. C. contended his patent was valid as a combination patent of old elements; that there could be no action for infringement of L.'s patent until C.'s patent was repealed by *scire facias*; and also that L.'s patent was not a new invention. At the trial there was evidence that there were other machines known and in use for making candles, but there was no evidence as to the cost of making candles with such machines, or what would

Patent of Invention—Continued.

have been a fair royalty to pay L. for the use of his patent. And it was proved also that L.'s trade had been increasing. The Superior Court on the evidence found that C.'s patent was a fraudulent imitation of L.'s patent, and granted an injunction and condemned C. to pay L. \$600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal to the Supreme Court of Canada it was Held, affirming the judgment of the courts below, Henry, J., dissenting, that C.'s machine was a mere colourable imitation of L.'s, based upon the same principles, composed of the same elements and differing from it only in the arrangement of those elements, and producing no results materially different; therefore L.'s patent had been infringed, and there was no necessity in order to recover damages for infringement that C.'s patent should first be set aside by *scire facias*.

Held, also, reversing the judgment of the court below, that in this case the profits made by the defendants was not a proper measure of damages; that the evidence furnished no means of accurately estimating the damages, but substantial justice would be done by awarding \$100.

Collette v. Lasnier.—xiii. 568.

6. *Infringement of—Coiled wire springs in groups—Substituted for India-rubber—Mechanical equivalent—Want of invention.*

In a suit for the infringement of a patent the alleged invention was the substitution in the manufacture of corsets of coiled wire springs, arranged in groups and in continuous lengths, for India-rubber springs previously so used. The advantage claimed by the substitution was that the metal was more durable, and was free from the inconvenience arising from the use of India-rubber caused by the heat from the wearer's body.

Held, affirming the judgment of the Court of Appeal for Ontario, Fournier and Henry, JJ., dissenting, that this was merely the substitution of one well known material, metal, for another equally well known material, India-rubber, to produce the same result on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of India-rubber, and it was, consequently, void of invention and not the subject of a patent.

Ball v. Crompton Corset Co.—xiii. 469.

7. *Carriage tops—Combination of elements—Novelty.*

P. D. obtained a patent for an improvement in the construction of carriages by the combination of a folding sectional roof, joined to the carriage posts in such a way and by such an arrangement of sections of the roof and of the carriage posts that the whole carriage top could be made entirely in sections of wood or other rigid material with glass sashes all round, and the carriage be opened in the centre into two principal parts and at once converted into an open uncovered carriage. In an action for infringement of this patent.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), and restoring the judgment of the Superior Court,

Patent of Invention—Continued.

Ritchie, C.J., and Gwynne, J., dissenting, that the combination was not previously in use, and was a patentable invention.

Dansereau v. Bellemare.—xvi. 180.

- 8, Covenant to obtain and assign patents for improvements in crimping machine—Agreement to employ inventor as servant—Right to a share in the profits—Arbitrary right of dismissal—Exercise of—Non-forfeiture of right to profits.—

See MASTER AND SERVANT, 2.

- 9, Manufacture of patented articles—Agreement for—Substitution of new agreement—Evidence.

See AGREEMENT, 22.

Payment—Into bank to credit of succession.

See BANKS AND BANKING, 4.

2. Consignment of goods subject to.

See SALE OF GOODS, 7.

3. Effect of.

See CONTRACT, 5.

4. By co-obligor.

See MORTGAGE, 2.

5. *Appropriation of—Interest.*

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between St. J., the plaintiff, and R., the defendant. The master found that \$453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note for \$510, and interest thereon as barred by the Statute of Limitations; and reduced the interest on a sum of \$3,000 advanced from twenty-four per cent. to six per cent. after judgment had been recovered. The note of \$510 was dated 18th November, 1881, and was payable with interest at the rate of \$10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into an agreement with him in order to relieve him from the pressure of execution debts, paid him \$2,000 on account of the indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870.

Held, that the evidence showed an appropriation by respondent of the \$2,000 on account of the debts for which he was being pressed, and as the note for \$510 was not included in such debts, the master was right in treating it as barred by the Statute of Limitations.

St. John v. Rykert.—x. 278.

Payment—Continued.**6. Delegation of in hypothec.***See* HYPOTHEC.**7. Into court—Plea of—Effect.***See* SALE OF GOODS, 12.**8. Fraudulent and simulated hypothec—Given in payment of goods—Right to sue for price.***See* SALE OF GOODS, 14.**9. Of money into court by defendant—Withdrawal of by plaintiff and right to retain though action subsequently dismissed.***See* PLEADING, 18.**10. Appropriation of payments—Statements of account rendered—Effect of.**

Towards the end of 1884, one Duncan Jackson, a dry goods merchant in Winnipeg, became embarrassed and was unable to pay his liabilities as they matured. Jackson's principal creditors were the appellants, (Green & Co.), whose claim was about \$2000, and Carscaden & Peck whose claim amounted to over \$1500.

Each creditor feared the other would get priority. Proposals were made with a view of effecting an arrangement, but before any settlement was effected each of these creditors issued writs against Jackson. While the suits were pending Carscaden & Peck offered to take 60 cents on the dollar for their claim or give the same for the claim of Green & Co. The appellants agreed to take the 60 cents on the dollar, but both suits went to judgment. Carscaden & Peck signed judgment against Jackson on the 22nd January, 1885, for \$1,252.44, and the appellants signed judgment against him on the 27th February, 1885, for \$2,112.67. The appellants were paid for their claim by Carscaden & Peck endorsing Jackson's note for \$1,164.67, dated February 21st, 1885, which note was paid by Carscaden & Peck on maturity and the appellant's judgment was duly assigned by them by indenture dated 2nd April, 1885, at Jackson's request. And Carscaden & Peck held that judgment as security for the amount of the note which they had endorsed and which they were obliged to pay.

After this arrangement Carscaden and Peck continued to furnish Jackson with goods. Jackson paid moneys thereafter from time to time, but never at any time did he pay his new account in full.

In January, 1887, Jackson owed Carscaden and Peck, on all accounts about \$8,000, and they then sued him and recovered a judgment against him for \$8,062.07 which with the amounts of the two judgments aforesaid and with some unmatured notes of Jackson's made up the total amount.

On the 10th January, 1887, a writ of *feri facias* against the goods of Jackson was issued on the first named judgment recovered by Carscaden and

Payment—Continued.

Peck against Jackson, for \$1,252.42 and placed in the Sheriff's hands on the same date.

A writ of *fiert facias* against the goods of Jackson was also issued on the judgment recovered by the appellants against Jackson, for \$2,112.67, on the said 10th day of January, 1887, and on the same date, placed in the Sheriff's hands, but only \$1,257.84 and interest was claimed thereon, being the amount actually paid by Carscaden and Peck to the appellants for their claim.

On the 7th February, 1887, a writ of *fiert facias* against the goods of Jackson was issued on the second named judgment recovered by Carscaden and Peck, for \$3,062.07 and placed in the Sheriff's hands on the same date.

Subsequently the respondents each recovered a judgment against Jackson and placed a writ of *fiert facias* against the goods of Jackson in the hands of the said sheriff.

On the 7th February, 1888, the sheriff seized the goods and stock in trade of Jackson and on the 17th day of the same month sold the same to Carscaden & Peck, at 78 cents on the dollar of the invoice price, the total purchase money amounting to \$6,101.16.

Immediately after the said sale the sheriff received notice from the respondents claiming that the two first above mentioned executions were paid and satisfied as against the respondents, thereupon he paid to Carscadden & Peck the amount of the third above mentioned execution namely \$3,062.07, and retaining the balance in his hands he took interpleader proceedings, and thereupon an issue was directed to try the validity of the appellant's execution, Carscaden & Peck being the real plaintiffs.

Carscaden & Peck, in the course of their dealings with Jackson, rendered to Jackson in all four statements of account, which are summarized as follows:—

1. Rendered Oct. 22rd, 1885.

This statement is divided into "Old Acct." and "New Acct."

"Old Acct." extends from Sept. 22nd, 1884, to Feb. 27th, 1885.

Debits	\$2,952 75
Credits	1,594 50

Balance	\$1,358 25
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J. Green & Co., note	\$1,164 67
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Interest on same	93 95	1,258 63
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Total	\$2,616 87
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"New Acct." extends from April 18th, 1885, to Oct. 23rd, 1885

Debits	\$2,587 55
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Credits	1,704 90
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Balance.....	\$882 65
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Payment—Continued.**2. Rendered Oct. 21st, 1886, and marked "New Acct."**

To amt. acct. rendered.....	\$832 65
Debits (goods)	14,506 77
	<hr/>
	\$15,339 42
Credits	9,740 58
	<hr/>
Balance	\$5,598 84

3. Rendered October 23rd, 1886.

This account is set out verbatim.

1885.

Oct. 23, to amount old account..... \$2,616 87

1886.

Feb. 24, Cash note, Green & Co..... 88 22

" " " 41 19

\$2,746 28

By amount overcharge on interest... 78

To amount old account..... \$2,745 50To amount new acct., as per detailed
statement..... 5,598 84

\$8,344 34**4. Rendered December 31st, 1886.**

To amount account rendered..... \$8,844 34

To debits (goods)..... 2,421 67

\$10,776 01Credits 2,992 17 |

Balance..... \$7,783 84

The various accounts are all blended into one account in No. 3, and the balance is then carried forward into one continuous account in No. 4, and all payments credited generally. These payments are more than sufficient to pay the old account, including the Green notes.

The issue was tried before Taylor, C.J., who gave judgment for respondents holding that whatever the original arrangement was for paying off the Greens, Carscaden & Peck, by the statements rendered and the receipts they gave, had so appropriated the payments made by Jackson, that the old account was paid off. This judgment was affirmed by the full court of Queen's Bench, Killam, J., delivering the judgment of the court. That learned judge held, that the verdict entered by the Chief Justice must be sustained upon the ground that the account rendered in December, 1886, showed a blending of all the accounts and an application of payments upon them generally, from which an appropriation to the earlier items of the account must be inferred.

Payment—Continued.

A view supported by the authorities cited and principally by *Simpson v. Cook*, 1 Bing. 461; *Hooper v. Keay*, 1 Q. B. D. 178; *City Discount Co. v. McLean*, L. R. 9 C. P. 692; Clayton's case, 1 Mer. 530; *re Sherry*, 25 Ch. D. 698, 702; *re Brown*, 2 Gr. 118; *Bodenham v. Purchas*, 2 B. & A. 39; *Merriman v. Ward*, 1 J. & H. 371; *Crompton v. Pratt*, 105 Mass. 255; *Buchanan v. Kerby*, 5 Gr. 337; *Bank of Scotland v. Christie*, 8 Cl. & Fin. 228; *Simpson v. Ingham*, 2 B. & C. 65.

That although it is shewn by the cases of *City Discount Co. v. McLean*, L. R. 9 C. P. 692; *Henniker v. Wigg*, 4 Q. B. 792; *Wilson v. Hirst*, 1 Nev. & M. 716, and *Crompton v. Pratt*, 105 Mass. 255, that this is not an absolute rule, but that the presumption arising from such a treatment of accounts is one which may be rebutted.

He could not find in the present case any sufficient evidence to rebut the presumption, and that the plaintiffs could take advantage of the satisfaction of the old judgment by payment, without the writ of *fiat facias* being first set aside.

On appeal to the Supreme Court of Canada it was Held, that the appeal should be dismissed, Gwynne and Patterson, JJ., dissenting, on the ground that in their view of the evidence it was agreed that all payments made by Jackson after the opening of the new account in April, 1885, should be applied to the new purchases until fully paid for, which agreement was continued to be acted upon until the closing of the account, and therefore the case did not come within the rule in Clayton's case, but rather within the exception to the rule as laid down in *City Discount Co. v. McLean*, L. R. 9. C. P. 693, and *Henniker v. Wigg*, 4 Q. B. 791.

Present: Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Green v. Clark.—30th April, 1889.

Penalties—Jurisdiction of Court of Vice-Admiralty to enforce.

See PARLIAMENT OF CANADA, 18.

2. Appropriation of, for contravention of Canada Temperance Act, 1878.

See CANADA TEMPERANCE ACT, 1878, 5.

3. Action for, for bribery—R. S. Q. Art. 429—Disqualification—Collateral matter—No appeal to Supreme Court—Future rights—S. & E. C. Act, R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 64.

4. Non-completion of Government contract — Certificate of engineer—Condition precedent.

See CONTRACT, 27.

Penalties—Continued.

5. Penalty for non-payment of taxes—Additional rate—B. N. A. Act, ss. 91 & 92—Interest—Municipal Act, Manitoba—49 V. c. 52, s. 626 (Man.)—50 V. c. 10, s. 43 (Man.)

See LEGISLATURE, 20.

Petition of Right.—*Intercolonial railway contract—31 V. c. 13, s. 18—Certificate of chief engineer—Condition precedent to recovery of money for extra work—Petition of right will not lie against the Crown for tort, or for the fraudulent misconduct of its servants—Forfeiture and penalty—Liquidated damages.*

On the 25th May, 1870, J. and S., contractors, entered into a contract with the Intercolonial Railway Commissioners, authorised by 31 V. c. 13, to construct and complete section No. 7 of the said Intercolonial railway for the Dominion of Canada, for a bulk sum of \$557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th November, 1870. The total amount paid on the 10th February, 1873, was \$557,750, the amount of the contract. The contractors thereupon presented a claim to the commissioners amounting to \$116,463.83 for extra work, &c., beyond what was included in their contract. The commissioners, after obtaining a report from the Chief Engineer, recommended that an additional sum of \$81,091.85 (less a sum of \$8,300 for timber bridging not executed, and \$10,354.24 for under drain taken off contractors hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to suppliants and refused.

The contractors thereupon, by petition of right, claimed \$124,663.33 as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that by orders of the Chief Engineer additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra; and alleging further, that they were put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in plans and bills of works exhibited at the time of letting.

On the profile plan it was stated that the best information in possession of the Chief Engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan, "but contractors must understand that these quantities are not guaranteed;" and in the bill of works, which purported to be an abstract of all information in possession of the commissioners and Chief Engineer with regard to the quantities, it was stated, "the quantities herein given as ascertained from the best data obtained are, as far as known, approximately accurate, but at the

Petition of Right—Continued.

same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate."

The contract provided *inter alia*, that it should be distinctly understood, intended and agreed that the said price or consideration of \$557,750 should be the price of, and be held to be full compensation for all works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans and specification, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act, intituled, "An Act respecting the construction of the Intercolonial Railway," or in the Commissioners or Engineer, by the said contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alterations in the grade or line of location; and that the said contract and the said specification should be in all respects subject to the provisions of the Act first cited in the said contract, intituled, "An Act respecting the construction of the Intercolonial Railway," 31 V. c. 18, and also, in so far as they might be applicable, to the provisions of "The Railway Act of 1868."

The 19th s. of 32 V. c. 18. enacts "that no money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the Commissioners. No certificate was given by the Chief Engineer of the execution of the work.

Held, by the Exchequer Court of Canada, Ritchie, J., that the contract requiring that any work done on the road must be certified to by the Chief Engineer, until he so certified and such certificate was approved of by the Commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered *dehors* the contract, then there was no such contract with the Commissioners as would give the contractors any legal claim against the Crown; the Commissioners alone being able to bind the Crown, and they only as authorized by statute. That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown fraudulent misconduct of its servants.

In the contract it was also provided that if the contractors failed to perform the works within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors would forfeit all money then due and owing to them under the terms of the contract, and also the further sum of \$2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872.

Petition of Right—Continued.

Held, that if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of \$2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages.

The Crown subsequently waiving the forfeiture, judgment was rendered in favour of the suppliants for the sum of \$2,486.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount.

Jones v. The Queen, in the Exchequer.—vii. 570.

2. Contract—Claim for extra work—Certificate of Engineer—Condition precedent—31 V. c. 12 (D.).

The suppliant engaged by contract under seal, dated 4th December, 1872, with the Minister of Public Works, to construct, finish and complete, for a lump sum of \$78,000, a deep sea wharf at the Richmond station at Halifax N.S., agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no extra work could be performed, unless "ordered in writing by the engineer in charge before the execution of the work." By letter, dated 26th August, 1873, the Minister of Public Works authorized the suppliant to make an addition to the wharf, by the erection of a superstructure to be used as a coal floor, for the additional sum of \$18,400. Further extra work, which amounted to \$2,781, was performed under another letter from the Public Works Department. The work was completed, and on the final certificate of the Government's engineer in charge of the works, the sum of \$9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875:—"Received from the Intercolonial Railway, in full, for all amounts against the government for works under contract, as follows: 'Richmond deep water wharf, works for storage of coals, works for bracing wharf, rebuilding two stone cribs the sum of \$9,681.'" The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with costs; and a rule *nisi* for a new trial was subsequently moved for and discharged.

Held, affirming judgment of the court below, that all work performed by the suppliant for the government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that the written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of the suppliant to recover payment for any other extra work. Henry, J., dissenting.

Per Ritchie, C.J., that neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada, has any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the

Petition of Right—Continued.

express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

O'Brien v. The Queen.—iv. 529.

3. *Prescription*—9 V. c. 37—*Right of the Crown to plead prescription*—10 years' prescription—*Good faith*—*Translatory title*—*Judgment of confirmation*—*Titre precaire*—*Inscription en faux*—*Improvements, claim for, by incidental demand*—Arts. 2211, 2251, 2206, C. C. L. C.—Art. 473, C. C. P. L. C.

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of P. W., jr., certain parcels of land originally granted by letters patent from the Crown, dated 5th January, 1806, to P. W., sr., together with a sum of \$200,000 for the rents, issues and profits derived therefrom by the government since the illegal detention thereof. As to the merits the defendant pleaded: 1. By peremptory exception, setting up title and possession in Her Majesty under divers deeds of sale and documents; 2. Prescription by 30, 20 and 10 years. An exception was also filed, setting up that these transfers to petitioners by the heirs of P. W., jr., were made without valid consideration, and that the rights alleged to have been acquired were disputable, *droits litigeux*. The general issue and a supplementary plea claiming value of improvements were also filed. To the first of these exceptions the petitioners answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed *en faux* against a judgment of ratification of title to a part of the property rendered by the Superior Court for the district of Aylmer, P.Q. To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of the defendant. There were also general answers to all the pleas. On the issues thus raised, the parties went to proof by an *enquête* had before a commissioner under the authority of the court, granted on motion, in accordance with the law of the province of Quebec. The case was argued in the Exchequer Court before J. T. Taschereau, J., and he dismissed the suppliant's petition of right with costs. Whereupon the suppliant appealed to the Supreme Court of Canada.

Held, Fournier and Henry, JJ., dissenting.—1. That before the Code, and also under the Code (Art. 2211), the Crown had under the laws in force in the Province of Quebec, the right to invoke prescription against a subject, which the latter could have interrupted by petition of right.

2. That in this case the Crown had purchased in good faith with translatory titles, and had by ten years peaceable, open and uninterrupted possession, acquired an unimpeachable title.

3. That in relation to the *Inscription en faux*, the Art. 473 of the Code of Procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the register of the court.

Petition of Right—Continued.

4. That the petitioner was bound to have produced the minute, or draft of judgment attacked, but having only produced a certified copy of the judgment, the inscription against the judgment falls to the ground.

5. That even if S. O.'s title was *titre précaire*, the heirs by their own acts ceded and abandoned to L. all their rights and pretensions to the land in dispute, and that the petitioner C. was bound by their acts.

Held, also, that the *impenses* claimed by the incidental demand of the Crown were payable by the petitioner, even if he had succeeded in his action.

Chevrier v. The Queen.—iv. 1.

4. *Fisheries, regulation and protection of—Fisheries Act, 31 V. c. 60 (D.)—British North America Act, 1867, ss. 91, 92 & 109—License to fish in that part of the Miramichi River above Price's Bend—Rights of riparian proprietors in granted and ungranted lands—Right of passage and right of fishing.*

On January 1st, 1874, the Minister of Marine and Fisheries of Canada, purporting to act under the powers conferred upon him by s. 2, c. 60, 31 V., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the South-west Miramichi River in New Brunswick, for the purpose of fly-fishing for salmon therein, the *locus in quo* being thus described in the special case agreed to by the parties:—"Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow."

Certain persons who had received conveyances of a portion of the river, and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavoring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease.

The Supreme Court of New Brunswick having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right, and claimed compensation from her Majesty for the loss of his fishing privileges and for the expenses he had incurred.

By special case certain questions were submitted for the decision of the court, and the Exchequer Court, **Held, *inter alia***, that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries consequently had no power to grant a lease or license under s. 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz: "Where the lands (above tide water) through which the said river passes are ungranted by the Crown could the

Petition of Right—*Continued.*

Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" Held, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of Canada on the main question; whether or not an exclusive right of fishing did so exist.

Held, affirming the judgment of the Exchequer Court 1st, that the general power of regulating and protecting the fisheries under the British North America Act, 1867, s. 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheries of the *locus in quo* was void, because said Act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramichi River flows.

2. That although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down, and a right of passage up and down, wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands *ad medium flum aquæ*.

3. That the rights of fishing in a river, such as is that part of the Miramichi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made, there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority.

4. *Per Ritchie, C.J., and Strong, Fournier and Henry, JJ.*, reversing the judgment of the Exchequer Court on the 8th question submitted, that the ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal.

The Queen v. Robertson.—vi. 52.

5. *Counsel fees, action for—Retainer for services before Fishery Commission—Jurisdiction.*

The suppliant, an advocate of the Province of Quebec, and one of Her Majesty's counsel, was retained by the Government of Canada as one of the counsel for Great Britain before the Fishery Commission which sat at Halifax pursuant to the Treaty of Washington. There was contradictory evidence as to the terms of the retainer, but the learned judge in the Exchequer Court found "that each of the counsel engaged was to receive a refresher equal to the retaining fee of \$1,000, that they were to be at liberty to draw on a bank at Halifax for \$1,000 a month during the sittings of the commission, that the expenses of the suppliant and his family were to be paid, and that the final amount of fees was to remain unsettled until after the award." The amount awarded by the Commissioners was \$5,500,000. The suppliant claimed \$10,000 as his remuneration, in addition to \$8,000 already received by him.

Petition of Right—Continued.

Held, per Fournier, Henry and Taschereau, JJ., that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that \$8,000 awarded him in the Exchequer Court was a reasonable sum.

Per Fournier, Henry, Taschereau and Gwynne, JJ.—By the law of the Province of Quebec, counsel and advocates can recover for fees stipulated for by an express agreement.

Per Fournier and Henry, JJ.—By the law also of the Province of Ontario counsel can recover for such fees.

Per Strong, J.—The terms of the agreement, as established by the evidence, showed, in addition to an express agreement to pay the suppliant's expenses, only an honorary and gratuitous undertaking on the part of the Crown to give additional remuneration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered; and the suppliant could therefore recover only his expenses in addition to the amount so paid.

Per Ritchie, C.J.—As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec; that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie.

Per Gwynne, J.—By the Petition of Right Act, s. 19, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances. By the laws in force there prior to 23 & 24 V. c. 84 (Imp.), counsel could not, at that time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover.

[This case was appealed to the Privy Council, where it was **Held**, 1. That according to the law of Quebec, a member of the bar is entitled, in the absence of special stipulation, to sue for and recover on a *quantum meruit* in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the bar.

2. That in the absence of stipulation to the contrary, express or implied, Mr. Doutre must be deemed to have been employed upon the usual terms upon which such services are rendered, and that his status in respect both of right and remedy was not effected either by the *lex loci contractus* or the *lex loci solutionis*.

3. That the P. R. Act, 1876, s. 19, s-s. 3, does not in such case bar the remedy against the Crown by petition. 9 App. cases 745.]

The Queen v. Doutre.—vi. 343.

Petition of Right—Continued.

6. *16 V. c. 235—Debentures issued by Trustees of the Quebec Turnpike Roads—Legislative recognition of a debt—Agents, liability of the Crown for acts by.*

Held, Ritchie, C.J., and Gwynne, J., dissenting, that the Trustees of the Quebec North Shore Turnpike Trust, appointed under ordinance, 4 V. c. 17, when issuing the debentures in suit, under 16 V. c. 235, were acting as agents of the Government of the late province of Canada, and that the said province became liable to provide for the payment of the principal of said debentures when they became due.

Per Henry and Taschereau, JJ.—That the Province of Canada had, by its conduct and legislation, recognized its liability to pay the same, and that respondents were entitled to succeed on their cross appeal as to interest from the date of the maturing of the said debentures.

Per Ritchie, C.J., and Gwynne, J.—That the trustees, being empowered by the ordinance to borrow moneys "on the credit and security of the tolls thereby authorized to be imposed and of other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the ordinance, and not to be paid out of or chargeable against the general revenue of this province," the debentures did not create a liability on the part of this province in respect of either the principal or interest thereof.

[On appeal to the Privy Council, the judgment of the Supreme Court was reversed, and the construction put on the statute by Ritchie, C.J., and Gwynne, J., was affirmed; 17 App. Cases 473].

Belleau v. The Queen.—vii. 58.

7. *Petition of Right Act, 1876, s. 7—Statute of Limitations—32 Henry VIII. c. 9—Buying pretended titles—Public Works—Rideau Canal Act, 8 Geo. IV. c. 1—6 Wm. IV. c. 16—Trustee, Contract by—Compensation for lands taken for Canal purposes—2 V. c. 19—7 V. c. 11, s. 29—9 V. c. 42.*

Under the provisions of 8 Geo. IV. c. 1, passed on the 17th February, 1827, by the Provincial Parliament of Upper Canada, and generally known as the Rideau Canal Act, Lt-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some 20 acres were actually necessary and used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to William McQueen all his interest in the said lands, and on the 6th February, 1832, William McQueen granted to Col. By all the lands previously granted to his mother, Grace McQueen. Col. By died on the 1st February, 1836.

Petition of Right—Continued.

By 6 William IV. c. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 V. c. 11, Canada, the Rideau Canal and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by section 29 it was enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same was taken."

By the 9 V. c. 42, Canada, it was recited that the foregoing proviso had given rise to doubt as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 Geo. IV. c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for the re-investing in him and his grantees of the portions of lands taken but not required for such purposes.

By the 19th and 20th V. c. 45, the Ordnance properties became vested in her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in her Majesty for the use of the Dominion of Canada.

The suppliants, the legal representatives of Col. By, brought a petition of right, alleging the foregoing facts, and seeking to have her Majesty declared a trustee for them of all the said lands not actually used for the purposes of the said canal, and praying that such portion of said lands might be restored to them, and the rents and profits thereof paid, and as to any parts sold that the value thereof might be paid together with the rents and profits prior to the selling thereof.

By his statement in defence, the Attorney-General contended, among other things, that (par. 5) no interest in the lands set out and ascertained by Col. By passed to William McQueen, but the claim for compensation or damages for taking said lands was personal estate of Grace McQueen, and passed to her personal representative; that (par. 6, 7 and 8) the deeds of the 31st January and 6th February, 1832, passed no estate or interest, the title and possession of the lands being in his Majesty, but that such deeds were void under 32 Hy. VIII. c. 9; that (par. 9) Col. By was incapable, by reason of his position, from acquiring any beneficial interest in said lands as against his Majesty; that (par. 10, 11, 12 and 13) Col. By took proceedings under 8 Geo. IV. c. 1, to obtain compensation for the lands in question, but the arbitrators, and also a jury summoned under the Act, decided that he was entitled to no compensation by reason of the enhancement of the value of his other land and of other advantages accrued by the building of the canal, and that this award and verdict were a bar to the suppliant's claim; that (par. 14 and 15) the proviso of 9 V. c. 42, was confined to Nicholas Sparks and did not extend to the lands in question; that (par. 16, 17, 18 and 19) by virtue of 2 V. c. 19 (Upper Canada) and a proclamation issued in pursuance thereof, all

Petition of Right—Continued.

claims for damages which might have been brought under 8 Geo. IV. c. 1, by owners of lands taken for the canal, including claims of the said Grace McQueen or Col. By, or their respective representatives, were, on and after the 1st April, 1841, forever barred; that (par. 26, 27 and 28) the suppliants were barred by their own *laches*; and that (par. 27) they were barred by the Statute of Limitations.

On a special case stated on the pleadings for the opinion of the court **Held**, by the Exchequer Court of Canada (Richards, C.J.), 1. The Statute of Limitations was properly pleadable under s. 7 of the Petition of Right Act of 1876.

2. William McQueen took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown, under 8 Geo. IV. c. 1, s. 1 & 3, and her right was converted into a claim for compensation under the 4th section.

3. This right of compensation or damages, if asserted under the 4th s. of Geo. IV. c. 1, would go to Grace McQueen's personal representatives, but if the land was obtained by surrender under the 2nd s. of the statute, then the heir-at-law of Grace McQueen would be the person entitled to receive the damages and execute the surrender.

4. The deeds of the 31st January, 1832, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dispute, except so far as the same may be considered as a surrender to the Crown under the 2nd s. of the Rideau Canal Act.

5. The 9th paragraph of the statement in defence is a sufficient answer in law to the petition.

6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statements therein to be true.

7. The proviso of 9 V. c. 42, s. 29 was confined in effect to the lands of Nicholas Sparks only.

8. If the claim is to be made by Grace McQueen's personal representatives under the 4th section of the Rideau Canal Act (and any claim by her could only be under that section) the Act referred to in the 16th, 17th, 18th and 19th paragraphs of the statement in defence have an application to this case and would constitute a bar against all claims to be made under the Rideau Canal Act. As to the claims made by the heirs of Col. By, they have no claims under any of the statutes.

9. If the Ordnance Vesting Act vested the 110 acres in question in the heirs of Col. By, the court was not prepared to say that their claim had been barred by *laches* on the statement set out in the petition. But the statute had not that effect, nor had Col. By or his legal representatives ever had for his or their own use and benefit any title to these 110 acres.

See also PETITION OF RIGHT, 24.

Tylee v. The Queen.—vii. 651.

Petition of Right—Continued.

8. *Tender for work on Intercolonial Railway—Acceptance by commissioners—Contract, liability of Crown for breach of—Extra work, claim for—Damages—31 V. c. 13—37 V. c. 15, effect of—Works completed 1st June, 1874—Certificate of engineer—Condition precedent, waiver of—Demurrer.*

In January, 1872, the commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection *inter alia* of certain engine houses, according to plans and specifications deposited at the office of the Chief Engineer at Ottawa. J. I. tendered for the erection of an engine house at Matapedia, and in October following he was instructed by the commissioners to proceed in the execution of the work, according to his accepted tender, the price being \$21,989. The work was completed and delivered to the Government in October, 1874. The specification provided as follows:—"The commissioners will provide and lay railway iron, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, J. I. was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, etc., until March following, owing to which delay he suffered loss and damage. During the execution of the work, J. I. was instructed and directed by the commissioners, or their engineers, to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings and specifications.

By his petition of right, J. I. claimed \$3,795.75 damages, in consequence of the delay on the part of the commissioners to provide the cast-iron columns, etc., and \$8,505.10 for extra works.

The Crown demurred, and also traversed the allegation of negligence and delay, and admitted extra work to the amount of \$5,056.60, and set up the 18th s. of 31 V. c. 13, which required the certificate of the Engineer-in-Chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial Railway.

By 38 V. c. 15, on the 1st June, 1874, the Intercolonial Railway was declared to be a public work vested in her Majesty, and under the control and management of the Minister of Public Works, and all the powers and duties of the commissioners were transferred to the Minister of Public Works, and s. 3 of 31 V. c. 13, was repealed, with so much of any other part of the said Act as might be in any way inconsistent with 37 V. c. 15.

Held, by the Exchequer Court of Canada, Fournier, J.: That the tender and its acceptance by the commissioners constituted a valid contract between the Crown and J. I., and that the delay and neglect on the part of the commissioners acting for the Crown to provide and fix the cast-iron columns, &c., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for the damages resulting from such breach.

2. That the extra work claimed for, being for a sum less than \$10,000, the commissioners had power to order the same under the statute 31 V. c. 13,

Petition of Right—Continued.

s. 16, and J. I. could recover, by petition of right, for such part of the extra work claimed as he had been directed to perform.

8. That the 18th s. of 31 V. c. 13, not having been embodied in the agreement with J. I., as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on that section of the statute for work done and accepted, and received by the Government.

4. That the effect of 37 V. c. 15, was to abolish the office of Chief Engineer of the Intercolonial Railway, and for work performed and received on or after the 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said Chief Engineer in accordance with s. 18 of 31 V. c. 18.

Isbester v. The Queen.—vii. 696.

9. *Executory contract—Crown, non-liability on—Recovery of value of work done if expenditure unauthorized by Parliament—31 V. c. 12, ss. 7, 15 & 20.*

By his petition of right, W., a sculptor, alleged that he was employed by the Dominion Government to prepare plans, models, specifications and designs, for the laying out, improvement and establishment of the Parliament square, Ottawa; that he had done so, and superintended the work and construction of said improvements for six months. He claimed \$50,000 for the value of his work.

31 V. c. 12, s. 7, provides that, when executory contracts are in writing they shall have certain requisites, such as signing, sealing and countersigning, to be binding; and by section 15 provides that before any expenditure is incurred there shall have been a previous sanction of Parliament, except for such repairs and alterations as the public service demands; and by section 20 requires that tenders shall be invited for all works, except in cases of emergency, or where from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the department.

Held, by the Exchequer Court of Canada, Richards, C.J.:—1. That the Crown in this Dominion cannot be held responsible under a petition of right on an executory contract entered into by the Department of Public Works for the performance of certain works placed by law under the control of the department, when the agreement therefor was not made in conformity with the above 7th section of 31 V. c. 12.

2. That under section 15 of said Act, if Parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the Department of Public Works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded.

3. That in this case, if Parliament has made appropriations for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department under section 20 of said Act, then no written contract would be necessary to bind the department, and suppliant should recover for work so done.

Wood v. The Queen.—vii. 684.

Petition of Right—Continued.**10. *Crown—Non-liability of, for negligence of its servants—Not a common carrier—Payment of statutory dues.***

Held, 1. That a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work.

2. That an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides.

3. That in such a case Her Majesty cannot be held liable as a common carrier.

The Queen v. McFarlane.—vii. 216.

11. *Non-liability of Crown for non-feasance or mis-feasance of its servants—Public work—Public police—Crown not a common carrier.*

McL., the suppliant, purchased, in 1880, a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train.

By petition of right the suppliant alleged that the railway was negligently and unskillfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway and that he was greatly and permanently injured in body and health, and claimed \$50,000.

The Attorney-General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants.

The learned judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of contract to carry the suppliant safely and securely, and awarded \$56,000.

On appeal to the Supreme Court of Canada, **Held**, Fournier and Henry, JJ., dissenting, that the establishment of government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for the purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the non-feasance or mis-feasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed on the public service on said railways. That the Crown is not liable as a common carrier for the safety and security of passengers using said railways.

The Queen v. McLeod.—viii. 1.

Petition of Right—Continued.

12. Contract—Non-liability of the Crown on Parliamentary printing contract.

H., in his capacity of "clerk of the Joint Committee of both Houses on Printing," advertised for tenders for the printing, furnishing the printing papers and the binding required for the Parliament of the Dominion of Canada. The tender of the suppliants was accepted by the Joint Committee and by both Houses of Parliament by adoption of the committee's report, and a contract was executed between the suppliants and H. in his said capacity. The suppliants, by their petition, contended that the tender and acceptance constituted a contract between them and Her Majesty, and that they were entitled to do the whole of the printing required for the Parliament of Canada, but had not been given the same, and they claimed compensation by way of damages.

Held, reversing the judgment of Henry, J., in the Exchequer Court, that the Parliamentary Printing was a matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it.

The Queen v. MacLean.—viii. 210.

13. Departmental Printing Contract—Mutuality—Liability of the Crown.

Under 82 & 83 V. c. 7, which provides that the printing, binding and other like work required for the several departments of the government shall be done and furnished under contracts to be entered into under authority of the Governor in Council after advertisement for tenders, the Under Secretary of State advertised for tenders for the printing "required by the several departments of the government." The suppliants tendered for such printing, the specifications annexed to the tender, which were supplied by the government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the Governor in Council, and an indenture was executed between the suppliants and her Majesty, by which the suppliants agreed to perform and execute, etc., "all jobs or lots of printing for the several departments of the Government of Canada, of reports, etc., of every description and kind soever coming within the denomination of Departmental printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specification hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the Departmental printing having been given to others, the suppliants, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing.

Held, affirming the judgment of Henry, J., in the Exchequer Court, that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance and the contract, there was

Petition of Right—Continued.

a clear intention shown that the contractors should have all the printing that should be required by the several departments of the government, and that the contract was not a unilateral contract but a binding mutual agreement. Taschereau and Gwynne, JJ., dissenting.

The Queen v. MacLean.—viii. 210.

14. *Contract—Government contract—Clause in—Construction of—Assignment—Effect of—Damages.*

On the 2nd August, 1878, H. C. & F. entered into a contract with Her Majesty to do the excavation, etc., of the Georgian Bay branch of the Canadian Pacific Railway. Shortly after the date of the contract and after the commencement of the work, H. C. & F. associated with themselves several partners in the work, amongst others S. & R. (respondents), and on 30th June, 1879, the whole contract was assigned to S. & R. Subsequently, on the 25th July, 1879, the contract with H. C. & F. was cancelled by Order in Council, on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th August, 1879, S. & R. notified the Minister of Railways of the transfer made to them of the contract. On the 9th August, the Order in Council of July 25th was sent to H. C. & F. On the 14th August, 1879, an Order in Council was passed stating that as the Government had never assented to the transfer and assignment of the contract to S. & R., the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification S. & R., who were carrying on the works, ceased work, and with the consent of the Minister of Public Works, realized their plant and presented a claim for damages, and finally H. C. & F. and S. & R. filed a petition of right claiming \$250,000 damages for breach of contract.

The statement in defence set up *inter alia*, the 17th clause of the contract which provided against the contractors assigning the contract, and in case of assignment without Her Majesty's consent, enabled Her Majesty to take the works out of the contractors' hands, and employ such means as she might see fit to complete the same; and in such case the contractor should have no claim for any further payment in respect of the works performed, but remain liable for loss by reason of non-completion by the contractor.

At the trial there was evidence that the Minister of Public Works knew that S. & R. were partners, and that he was satisfied that they were connected with the concern. There was also evidence that the department knew S. & R. were carrying on the works, and that S. & R. had been informed by the Deputy Minister of the department that all that was necessary to be officially recognized as contractors was to send a letter to the government from H. C. & F.

In the Exchequer, Henry, J., awarded the suppliants \$171,040.77 damages.

On appeal to the Supreme Court of Canada it was Held, reversing the judgment of Henry, J., Fournier and Henry, JJ., dissenting, that there was no evidence of a binding assent on the part of the Crown to an assignment of the contract to S. & R., who, therefore, were not entitled to recover.

2. That H. C. & F., the original contractors, by assigning their contract put it in the power of the government to rescind the contract absolutely, which

Petition of Right—Continued.

was done by the Order in Council of the 14th August, 1871, and the contractors under the 17th clause could not recover either for the value of work actually done, the loss of prospective damages, or the reduced value of the plant.

Queen v. Smith.—x. 1.

15. *Agreement with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint misfeasor—Judgment obtained against—Effect of, in reduction of damages—Pleading—37 V. c. 16.*

By an agreement entered into between the Windsor and Annapolis Railway Company and the Government, approved and ratified by the Governor in Council, 22nd September, 1871, the Windsor Branch Railway, N. S., together with certain running powers over the trunk line of the Intercolonial, was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B., being and acting as Superintendent of Railways, as authorized by the Government (who claimed to have authority under an Act of the Parliament of Canada, 37 V. c. 16, passed with reference to the Windsor Branch, to transfer the same to the Western Counties Railway Company otherwise than subject to the rights of the Windsor and Annapolis Railway Company) ejected suppliants from and prevented them from using said Windsor Branch and from passing over the said trunk line; and four or five weeks afterwards said Government gave over the possession of said Windsor Branch to the Western Counties Railway Company, who took and retained possession thereof.

In a suit brought by the Windsor and Annapolis Railway Company against the Western Counties Railway Company for recovery of possession, &c., the Judicial Committee of the Privy Council held that 37 V. c. 16 did not extinguish the right and interest which the Windsor and Annapolis Railway Company had in the Windsor Branch under the agreement of 22nd September, 1872.

On a petition of right being filed by suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of 22nd September, 1871, the Exchequer Court of Canada, Gwynne, J., presiding, held that the taking possession of the road by an officer of the Crown under the assumed authority of an Act of Parliament was a tortious act for which a petition of right did not lie.

On appeal to the Supreme Court of Canada, **Held**, Strong and Gwynne, JJ., dissenting, that the Crown by the answer of the Attorney-General did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious, they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed.

Petition of Right—Continued.

Therefore the Crown, by its officers, having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach become possessed of the suppliant's property, the petition of right would lie for the restitution of such property and for damages.

Prior to the filing of the petition of right, the suppliants sued the Western Counties Railway Company for the recovery of the possession of the Windsor Branch, and also by way of damages for monies received by the Western Counties Railway Company for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of Canada, to which court an appeal in said cause had been taken, and which affirmed the judgment of the Supreme Court of Nova Scotia.

Held, *per* Ritchie, C.J., and Taschereau, J., that the suppliants could not recover against the Crown, as damages, for breach of contract, what they claimed and had judgment for as damages for a tort committed by the Western Counties Railway Company, and in this case there was no necessity to plead the judgment.

Per Fournier and Henry, JJ., that the suppliants were entitled to damages for the time they were by the action of the Government deprived of the possession and use of the road to the date of the filing of their petition of right.

Windsor and Annapolis Railway Co. v. The Queen and the Western Counties Railway Co.—x. 835.

[In this case on appeal to the Judicial Committee of the Privy Council the judgment of the Supreme Court was reversed in part. See 55 L. J. P. C. C. 41.]

16. *Petition of right—Condition precedent—Pleading—Contract* —31 V. c. 13, s. 18 (D).

The suppliants by their petition of right alleged that they were contractors for the building of section No. 4 of the Intercolonial Railway, and duly entered upon and completed their contract, which contract they alleged was under the Act entitled "An Act respecting the construction of the Intercolonial Railway, within the time, and according to the terms, covenants and conditions set forth in said contract. That in following the directions and instructions of the commissioners and the engineers employed and placed in charge of the said works, which directions and instructions were given from time to time as provided by the contract, and the said suppliants were bound to follow, and did follow, they performed a large amount of extra work not comprised in said contract, nor in the data furnished to them at the time the said contract was entered into, nor in the schedules and specifications referred to in said contract and connected therewith, and not intended to be covered by the lump sum, which formed the consideration money of said contract. That they were put to great expense by delays in preparations by the commissioners

Petition of Right—Continued.

and engineers, and to great loss and damage by reason of changes and alterations necessitated by the unskilful manner in which the works had been laid out by the engineers. That the suppliants were deceived and misled in making their estimates by insufficient and erroneous data in the schedule of works and quantities prepared and published by the chief engineer. That it had not been the usage, nor was it the intention of the parties, to be held to the strict letter of the contract when the schedule gave erroneous or insufficient information, entailing extra work which could be performed only with ruinous consequences, but they were entitled to be paid for such extra work. The suppliants set out at length the various kinds of extra work done and changes made, and prayed for a settlement of accounts, that they might be allowed their claim for the extra work done, for the materials provided by them, for damages resulting from defects of plans, specifications and surveys, from changes made in location, grade, etc., from the negligence and want of skill of the government engineers, and for breach of the contract in being prevented from proceeding with the work, and that they might be reimbursed sums of money advanced during the progress of the work with interest.

The Attorney-General demurred on the following grounds: That it did not appear by the petition that the chief engineer of the I. C. Ry. had certified that the work for or on account of which the suppliants claimed had been duly executed, or that the suppliants were entitled to be paid therefor or for any part thereof, nor that such certificate had been approved of by the commissioners of said railway as required by s. 18 of the Act of the Parliament of Canada, entitled "An Act respecting the construction of the I. C. Ry.," passed in the 31st year of H. M. reign; that H. M. was not responsible in a petition of right for the damages and injuries mentioned; that it did not appear by the terms of the contract the commissioners or their engineers were under any obligation to lay out work or furnish specifications therefor; that it appeared by the petition that the extra work claimed for was done in pursuance of directions given by the engineers as provided by the contract, and it was not alleged any extra payment was to be made therefor; that it was immaterial that the schedules of works were defective or erroneous, because such schedules were not alleged to have been warranted as accurate, but only of probable quantities, and the demurrer denied liability for any of the other matters mentioned in the petition on the ground that the contract provided for them, or that the work, if done, was not in any way warranted by H. M., or had been done under the directions of the engineers acting within the contract.

In the Exchequer Court, Henry, J., overruled the demurrer with costs.

On appeal to the Supreme Court of Canada by the Attorney-General, **Held**, that the suppliants' petition was too indefinite in form, and was insufficient in not setting out the contract, and a compliance with the requirements of s. 18 of 31 V. c. 13 (C.), or satisfactory ground of non-compliance with the condition precedent required by that section.

Appeal allowed. Judgment of the Exchequer Court reversed, with leave to the suppliant (the Crown assenting) to amend his petition, on payment of

Petition of Right—Continued.

costs of appeal and demurrer, by setting out the contract and such averments as he might be advised.

The Queen v. Smith.—Nov. 20, 1879.

17. Breach of notarial contract—Representations.

On the 14th of July, 1875, the Government of Canada, through one Louis Morin, advertised for tenders for the removal of steel rails from the harbour of Montreal to the rock cut at Lachine. The suppliant tendered for the contract according to the advertisement, and suppliant's tender being accepted, a notarial deed of contract was entered into and executed. The contract provided, *inter alia*, "that the said party of the second part hereby undertakes to remove and carry, for the Government of the Dominion of Canada, all the steel rails that are actually, or that will be landed from sea-going vessels on the wharves of the harbour of Montreal, during this season of navigation, and deliver and lay on the ground the said steel rails, at the place commonly called the Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned. By his petition of right, the suppliant alleged a breach of the contract by the Crown, and that Morin, acting for the Crown, represented to the suppliant, that some 80,000 tons of rails would have to be removed, and that under such representations the suppliant entered into the contract. The amount claimed was \$10,000.

Held, by the Exchequer Court, Taschereau, J., that under the terms of the contract, the suppliant was entitled to have the removal of all the rails landed in Montreal during the season of 1875, and the Government, having had 5,000 tons of these rails removed by another party, were answerable in damages for the breach of contract.

Held, also, that the representations made by Morin, as agent of the Crown, as to the probable quantity to be landed, were unauthorized, and having been made previous to the written contract, could not be said to form part of said contract.

Kenny v. The Queen, 1 Can. Exch. C. R. 68.—6th March, 1882.

18. C. S. (C.) c. 28, 31 V. c. 12—Slide and boom dues, regulations as to—Chattel mortgage—Agreement between Crown and mortgagor of lumber, effect of—Lien.

This was a petition of right, filed by the appellants, praying that a seizure of a quantity of logs, which was made by the government collector for arrears of slide dues, owed by one S. for the logs seized and other logs, be removed, and that the sum of \$5,267, which had been paid by the appellants to the Crown, under duress, be refunded to them.

S., being indebted to the appellants in a large sum of money, had given them, as collateral security for the amount of his debt, two chattel mortgages on certain logs and timber. These mortgages were executed, the first on 18th December, 1876, and the second on 11th May, 1877. On 15th May, 1877, S. became insolvent, and in 1878, the equity of redemption of the insolvent in the chattel mortgages was duly released to appellants by S's assignee. In June, 1877, S., who had been allowed to remain in possession of the property,

Petition of Right—Continued.

and to attend to the manufacture and disposal of the lumber in virtue of special provisions in the mortgages, and who owed also a large sum of money to the government for slide dues for several years back, in order to repay this general indebtedness for dues, agreed with the government to pay \$2 per 1,000 feet B. M., on all lumber to be shipped by him through the canals. The dues fixed by the regulations of the government for each log were 4 cents, equal to about 26 cents per 1,000 feet B. M. The appellants claimed that this arrangement was unknown to, and had never been ratified by them.

In 1878, when the appellants began to ship the lumber in question on barges, the collector of slide dues refused to allow the barges to pass through the canals until the appellants paid the \$2 agreed upon between S. and the government.

The cause was tried before Gwynne, J., in the Exchequer, who Held, 1. No weight could be given to an objection urged by petitioners that the Crown can acquire title only by record, and therefore no claim upon behalf of the Dominion Government could be asserted in virtue of the agreement relied upon in the answer of the Attorney-General as made with S. The Dominion Government must, under s. 7 of the Petition of Right Act of 1876, be entitled to whatever benefit may accrue therefrom equally as any subject of the Crown, if the proceeding were an action against such subject.

2. The provisions and enactments relating to tolls in 31 V. c. 12 (C.), are in substance and effect the same as the provisions in c. 28 of the Con. Stats. (C.), under which the regulations relating to timber passing through the slides were made, and therefore under the provisions of s. 71 of 31 V. c. 12, those sections must be read as having been in force since the passing of c. 28 of the Con. Stat., and therefore the regulations made under that statute are in effect regulations to be construed as made under 31 V. c. 12.

3. If S. were the suppliant asserting a claim against the Government based upon the seizure of the lumber which was seized for the purpose of realizing thereout the arrears of slide dues, to such a claim the defence that what was done was by the leave and license of S., and in pursuance of an agreement to that effect made by him would have been sufficient. *The Attorney-General v. Coutois*, 25 Grant 346 referred to.

4. Sitting in the Court of Exchequer, not as a Court of Appeal, but in an Ontario case to administer the law of Ontario, the judge was bound by the authority of *McAuley v. Allen*, 20 U. C. C. P. 417, followed in *Samuel v. Coulter*, 28 U. C. C. P. 240, to hold that the suppliants, by the indenture of the 18th December, 1876, by reason of there being no redemise clause or proviso as to grantor retaining possession until default inserted in it, became entitled both to the property and possession of the property granted by the indenture, and being so entitled might, if they had pleased, at any time have exercised their right to sell therein contained. But by the terms of the indenture, the suppliants reserve the right to dictate into what description of lumber the logs should be manufactured, with whom alone contracts for the sale of the lumber might be entered into, and to whom upon sales it should be consigned, and all this was provided for being done through the intervention of S., but for their sole benefit, S. covenanting to act only under the direction of and to the satisfaction

Petition of Right—Continued.

of the suppliants. The effect and intent of the indenture, therefore, was to make suppliants principals and S. their agent in carrying on the business in which he had been engaged in future for the benefit of the suppliants, and with their property, until it should be sold or they should be paid their debt. As such agent S. must be considered to have had sufficient authority to bind the suppliants by his agreement with the Government.

5. But whether S. was so authorized or not, the suppliants adopted, ratified and confirmed the agreement by acting under it and advancing moneys to pay the Government, in accordance with its terms, after they must be held to have had full knowledge of the nature and effect of it.

On appeal to the Supreme Court of Canada, *Held*, reversing the judgment of Gwynne, J., that S. had no authority, express or implied, from the bank, after the execution of the mortgages, by any agreement with the Crown, to pledge the property covered by the mortgages for the payment of any arrears of Crown dues, or to impose on such property any lien, charge or burthen other than the law had attached to it for the slidage and boomage of that specific property.

That there was no evidence that the bank had any knowledge of any general lien or charge on that property, or of any arrears other than on the lumber mentioned in the mortgages, or of any claim by the Crown other than for the slidage and boomage on the logs in dispute.

That if the bank did know there were arrears for slide or boom dues on logs previously brought down and manufactured into lumber, such knowledge would not create a charge or attach a lien for such dues on other lumber than that for the slidage and boomage of which they became due.

That if S. did propose by any arrangement with the Crown to give the Crown a charge or lien for arrears due for other lumber, there was no evidence of any adoption, ratification or confirmation of any such arrangement by the bank.

That there was nothing in the law or regulations giving the Crown any general lien for arrears, or for any general balance which the owner of logs may owe the government, or any lien except on the specific lumber for the amount due for its passage or boomage, viz., 4c. per log, equal to 26c. per 1,000 ft. B.M.

That the transaction was in no sense that of principal and agent, but of debtor and creditor, in which the debtor by mortgage by way of collateral security transferred property to his creditor and agreed to retain possession and so deal with it that its value should be realized in such a manner as to secure to the creditor the proceeds in payment of his debt, the surplus, if any, being for the benefit of the mortgagor. Having transferred the property by way of mortgage, S. was in no position to give by agreement or otherwise a charge to take precedence of such mortgage.

Per Fournier, J., without giving any decided opinion as to the validity of the regulations by virtue of section 71 of 31 V. c. 12, such regulations might be looked at to ascertain the amount of dues which could be claimed under them, because the appellants could not at the same time admit and deny the validity

Petition of Right—Continued.

of such regulations. Admitting they were invalid, the logs in question having passed through the government slides, there would still be due to the government the value of the services rendered, and by tendering \$1,500 the suppliants admitted that something was justly due to the government, if not legally due in virtue of the regulations.

Appeal allowed with costs, Strong and Taschereau, JJ., dissenting.

The Merchants' Bank of Canada v. The Queen.—22nd June, 1882.

See 1 Can. Exch. C. R. 1.

19. Claim for breach of contract—Interest on profits refused.

See INTEREST, 6.

20. Provincial debt, liability of Dominion for—Order in Council—Account stated—Consideration—Right to petition.

Prior to confederation, one T. was cutting timber under license from the old Province of Canada on territory in dispute, between that province and the Province of New Brunswick. In order to utilize the timber so cut he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and only released upon payment of fines. This continued for two or three years until T. was obliged to abandon the business.

As a result of negotiations between the two provinces, the boundary line was finally fixed, and a commission was appointed to determine the state of accounts between them in respect to the disputed territory. One member of the commission only reported New Brunswick to be indebted to Canada in the sum of \$20,000 and upwards, and in 1871 these figures were verified by the Dominion auditor.

Both before and after confederation T. frequently urged the Government of Canada to collect this amount, and indemnify the licensees who had suffered owing to the said dispute; and finally, by an Order in Council of the Dominion Government (to whom it was claimed the debt was transferred by the B. N. A. Act) it was declared that a certain amount was due to T. which would be paid on his obtaining the consent of the Governments of Ontario and Quebec. Such consent was obtained, and payments were made by the Dominion Government to T. and to the suppliant to whom the claim was assigned, and the suppliant proceeded by petition of right to recover the balance; the government demurred on the ground that the claim was not founded upon a contract and that the petition would not lie.

Fournier, J., in the Exchequer Court, overruled the demurrer, and, on appeal to the Supreme Court of Canada, **Held**, reversing the judgment of Fournier, J., Fournier and Henry, JJ., dissenting, that there being no previous indebtedness shown to T. either from New Brunswick, the Province of Canada or the Dominion, the Order in Council did not create a debt between T. and the Dominion, and petition would not lie.

Appeal allowed with costs.

The Queen v. Dunn—22 C. L. J. 14—xi. 385.

Petition of Right—Continued.

21. Assessment for sidewalks—Non-liability of Crown.

The suppliants by their petition of right set out :—

“That there is due to the said corporation, by the Government of the Dominion of Canada, the sum of one thousand five hundred and eighty dollars and fifty cents for divers works done, materials furnished, and money disbursed, for sidewalks (trottoirs) in front of the different immovable properties belonging to the said government in the said City of Quebec, and other works, as detailed in the bill of particulars hereunto annexed.”

“Wherefore your suppliant humbly prays that it may be ordered and adjudged by the said court, that Her Majesty the Queen, and the said Government of the Dominion are indebted unto the said corporation of the City of Quebec in the said sum of one thousand five hundred and eighty dollars and fifty cents, and that an order and judgment to the effect thereof be given for the payment of the said sum.”

The statement in defence was as follows :—

“Her Majesty’s Attorney-General admits that the suppliants performed certain works, furnished materials and expended money for sidewalks in front of the different immovable properties belonging to the Government of Canada, in the City of Quebec, and for other works, as alleged in the suppliant’s petition of right.”

“Her Majesty’s Attorney-General alleges, as the fact is, that the said works performed, materials furnished and money expended in the said petition mentioned were not so done, furnished and expended by the suppliants at the request of Her Majesty, but were so done, furnished and expended by the suppliants in pursuance of and by virtue of certain powers vested in them by the Act of the Province of Canada, passed in the 29th year of Her Majesty’s reign, chaptered 57, intituled an ‘Act to amend and Consolidate the Provisions contained in the Acts and Ordinances relating to the Incorporation of, and the Supply of Water to the City of Quebec,’ and the several Acts in amendment thereof, and for which the suppliants might make assessments as therein provided; and that the suppliants claim is for the recovery of the taxes so assessed upon the said lands and immovable properties of Her Majesty in the City of Quebec; but the said Attorney-General submits that the said lands and immovable properties are not liable to taxation, and that no action lies against Her Majesty for the recovery of taxes; and Her Majesty’s Attorney-General claims the same benefit from this objection as if he had demurred to the said petition.”

Issue was joined on these pleadings; and the case was argued before the Exchequer Court, Fournier, J., presiding, on the facts set out, without any evidence being taken.

Held, that the Crown was not liable, and that the petition must be dismissed with costs.

The Corporation of the City of Quebec v. The Queen, 2 Can. Exch. C. R. 480.

—30th April, 1886.

Petition of Right—Continued.

22. Intercolonial railway contract—31 V. c. 13, s. 18—Certificate of engineer a condition precedent—Forfeiture and penalty clauses.

See CONTRACT, 27.

23. Petition of Right Act of Province of Quebec, 46 V. c. 27—Provisions of S. & E. C. Act as to appeals apply to cases arising under.

See APPEAL, 19.

24. *Remedy by—Lands taken for public purposes—Disposal of lands not used—7 V. c. 11, s. 29—Mandamus.*

By the Rideau Canal Act, 8 Geo. IV. c. 1, certain lands of McQ. were set apart for canal purposes but not all so used. By the Ordinance Vesting Act, 7 V. c. 11, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by s. 29 it was enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the use of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken." The heir-at-law of McQ. sought to recover from the Crown, by petition of right, the lands not used for the canal, or indemnity for such as had been sold by the Crown.

Held, per Strong, J., a petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under s. 29. Where it is within the power of a party having a claim against the Crown of such a nature as the present to resort to a petition of right, a *mandamus* will not lie, and a *mandamus* will never, under any circumstances, be granted where direct relief is sought against the Crown.

McQueen v. The Queen.—xvi. 1.

And see DEED, 10.

ESTOPPEL, 10.

LIMITATIONS, 10.

25. Claim for extra work done on Intercolonial Ry.—31 V. c. 13, ss. 16, 17, 18, and 37 V. c. 15—Change of chief engineer before final certificate given—Reference of suppliant's claim to engineer—Report by engineer—Effect of—Approval by commissioner or minister necessary.

See CONTRACT, 38.

26. Submission to *amiables compositeurs*—Of claim against government of Province of Quebec—Award—Petition of right to set aside—Finality of award—Art. 1346, C. C. P.

See ARBITRATION AND AWARD, 24.

CAS. DIG.—41

Petition of Right—Continued.

27. R. S. Q., Art. 5976—Sale of timber limits—Licensees—Plans—Description—Damages—Art. 992, C. C.—Practice—Style of cause.

See CROWN, 28.

Petitory Action.—*To recover church property—Denial of quality by defendant sued as trustee.*

The facts of the case, as stated by the plaintiff in his *factum*, are that by deed of sale passed before notary public on the 23rd November, 1871, and duly registered, the plaintiff, John Morrison, the defendant, and two others as trustees of the Presbyterian Church of Côte St. George, in connection with the Church of Scotland, became purchasers of the ground upon which subsequently a church was erected.

When this action was brought, the whole of the trustees, with the exception of the plaintiff and defendant, were dead.

A union of Presbyterian Churches in Canada took place in June, 1875.

To further this union and remove any obstructions which might arise out of the trusts by which the property of any of the churches was held, the "Union Act," 88 V. c. 72, 1875, (Q.) was passed.

This Act, s. 2, provided "that if any congregation in connection or communion with any of the said churches decide, at any meeting of the said congregation regularly convened, according to the rules of the said congregation, or the custom of the church with which it is in connection, and held in the two years after such union, by the majority of the votes of those who, according to the rules of the said congregation, or the custom of the church with which it is in connection, are entitled to vote at such meeting, not to form part of the said union, but on the contrary to separate itself therefrom, then and in such case, the property of the said congregation shall not be affected by this Act, nor by any of the provisions thereof."

Plaintiff claimed that no meeting of the above congregation had been regularly convened, or conducted according to its rules, or the custom of the church, and that consequently the property was affected by the above statute, and should be held and administered for the benefit of the said congregation in connection with the united church, to wit, "The Presbyterian Church in Canada."

Plaintiff also alleged that the defendant had ceased to be a trustee, and, acting with a minority of the congregation who refused to enter into the united church, had taken forcible possession of the church property and excluded therefrom the plaintiff and the congregation, for which he was trustee.

And plaintiff as sole surviving and acting trustee, suing for himself in his said quality, and for the congregation, claimed the property and that defendant be ordered to quit and abandon the same, and be declared not to be a trustee of said property.

Petitory Action—Continued.

Defendant admitted that he was not a trustee, but, while saying that he had no quality to defend the action, proceeded to allege that three regular convened meetings had been held, within the two years, the effect of which was to take the church and property out of the union.

He also alleged that at these regularly convened meetings trustees were legally appointed to replace those deceased.

The Superior Court, Johnson, J., presiding, dismissed appellant's action on the sole ground that because the trust deed said nothing about survivors, but provided for a succession, there could be no action unless the succession was first filled up.

The judgment of the Court of Queen's Bench confirmed this judgment, the majority presumably on the ground taken by Mr. Justice Johnson, Mr. Justice Cross alone giving as his reason that the meetings referred to were sufficient compliance with the law to take the property out of the union.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the courts below, that the action being a petitory action, and the defendant having pleaded and proved that he was not and had never pretended to be in possession of the immovable claimed, the plaintiff must fail; and that the plaintiff was not entitled to a judgment declaring one not a trustee who did not pretend to be and admitted that he was not a trustee. Henry, J., dissenting.

Appeal dismissed with costs.

Morrison v. McCuaig.—19th June, 1883.

2. By trustees of Quebec North Shore turnpike roads—No title to support.

See ROAD.

3. Right to bring, reserved to defendant in possessory action.

See POSSESSORY ACTION.

Pew-holder—Rights of, in St. Andrew's Church, Montreal—Damages.

J., an elder and member of the congregation of St. Andrew's Church, Montreal, had been a pew-holder in St. Andrew's Church continuously from 1867 to 1872, inclusive. In 1869 and 1872 he occupied pew No. 68, and received for the rental of 1872 a receipt in the following words :

“ 66.50

MONTREAL, January 9th, 1872.

“ Received from James Johnston the sum of sixty-six dollars and fifty cents, being rent of first-class pew No. 63, in St. Andrew's Church, Beaver Hall, for the year 1872.

“ For the Trustees, J. CLEMENTS.”

On the 7th December, 1872, the Trustees notified J. that they would not let him a pew for the following year. J. thereupon tendered them the rental for the next year, in advance. On several occasions in 1873, and while still an elder and member of the congregation, he was disturbed in the pos-

Pewholder—Continued.

session of pew No. 68, by the respondents, the pew having been placarded "For Strangers," strangers seated in it, his books and cushions removed, etc. For these torts he brought an action against respondents, claiming \$10,000 damages.

Held, that J., being an elder and member of the congregation of St. Andrew's Church, Montreal, as such lessee, having tendered the rent in advance, was, under the by-laws, custom and usage, and constitution of St. Andrew's Church, entitled to a continuance of his lease of the pew for the year 1878, and that reasonable, but not vindictive, damages should be allowed, viz. \$800. (The Chief Justice and Strong, J., dissenting).

Johnston v. the Minister and Trustees of St. Andrew's Church.—i. 235.

[In this case the Judicial Committee of the Privy Council refused leave to appeal.]

The Judicial Committee **Held**, that, although Her Majesty's prerogative to allow an appeal was preserved by s. 47 of the Sup. and E. C. Act, 38 V. c. 11, neither the magnitude of the case, nor the effect which the decision might have upon a number of other cases, made it a case in which an appeal should be allowed.

3 App. Cases 159.—10th Dec. 1877.

As to the prerogative right to allow an appeal as an act of grace, see *Cushing v. Dupuy*; 5 App. Cases 409.

In a case of the *Bank of New Brunswick v. McLeod* (not reported) a petition was presented for special leave to appeal from the judgment of the Supreme Court of New Brunswick. In refusing leave the Judicial Committee gave reasons to the following effect:—

1. The policy of the Dominion Legislature is to discountenance appeals in matters of insolvency, so much so that not even an appeal to the Supreme Court of Canada is allowed, and the final decision is made to rest with the highest court in each province.

2. The Dominion Legislature cannot affect the prerogative of the Crown to grant special leave to appeal, but in advising Her Majesty whether the prerogative should be exercised, the Privy Council pays attention to the expressed wishes of the Colony, and will not recommend its exercise except in cases of general interest and importance, and then only when it manifestly appears that the court below has erred in a matter of law.

3. But even if it should be shown that the court below has so erred leave will be refused, if it appear that the court below has decided the case independently of any point of law upon a particular view of the facts, for the Privy Council adopts the facts as found by the court below, and will not review such findings in an appeal entertained as an act of grace. June, 1882.

Plan—Description by reference to.

See BOUNDARY.

EASEMENTS.

Plan—Continued.

2. Signed by adjoining proprietors.

See BOUNDARY, 2.

3. Sale of lands according to—Registration of a different plan—Acceptance of conveyance.

See SALE OF LANDS, 16.

4. Sale of timber limits—Plan furnished by Crown prior to sale—misdescription—Petition of Right to recover for loss sustained—R. S. Q., Art. 5976—Art. 992, C. C.—Practice—Style of cause.

See CROWN, 28.

Pleading—Additional plea—Supreme Court no power to allow.

D. McM., the respondent, sued S. W. B. Co., the appellants, to recover damages alleged to have been sustained by reason of the obstruction of the river Miramichi by appellant's booms. The pleas were not guilty, and leave and license. On the trial counsel proposed to add a plea, that the wrong complained of was occasioned by extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty. On appeal, counsel for the appellant contended that the obstruction complained of was justified under the statute 17 V. c. 10, (N.B.), incorporating the South-West Boom Company.

Held, that the appellants, not having put in a plea of justification under the statute, or applied to the Supreme Court of New Brunswick in Banco for leave to amend their pleas, could not rely on that ground before this court to reverse the decision of the court below.

[But see now R. S. C. c. 135, s. 68.]

The South-West Boom Co. v. McMillan.—iii. 700.

2. Objection in Court of Appeal, not taken by.

See BENEFIT SOCIETY.

3. Pleas—Amendment of, in Supreme Court.

See JURISDICTION, 20.

4. Assignee—Trader—Insolvent Act, 1875.

See INSOLVENCY, 4.

5. Equitable Plea in action for calls.

See CORPORATIONS, 10.

Pleading—Continued.

6. Want of proper stamps, not a defence which need be pleaded.
See **BILLS OF EXCHANGE AND PROMISSORY NOTES**,
 2, 6.
7. Plea that contract made in England.
See **INSOLVENCY**, 5.
8. Insufficiency of Petition of Right.
See **PETITION OF RIGHT**, 16.
9. In action on order under Companies' Act, 1862 (Imp.)
See **CORPORATIONS**, 15.
10. In action between adjoining land owners.
See **DAMAGES**, 20.
11. Equitable plea in action on Bond.
See **MORTGAGE**, 10.
12. *Jus tertii*—Adding plea of justification under writ of replevin.
See **CONTRACT**, 14.
13. Plea of tender and payment into court—Effect of.
See **SALE OF GOODS**, 12.
14. Motion to amend—Insufficiency of affidavit—Matter of Procedure—Supreme Court will not interfere.
See **JURISDICTION**, 85.
15. Dilatory exception—Plaintiff out of Province—Art. 120, C. C. P.,
 s-s. 7.
See **DAMAGES**, 80.
16. Appellate Court bound to give effect to prescription, though not pleaded.
See **LAND**, 8.
PRESCRIPTION, 12.
17. Amendments of pleading to make them conform to evidence.
See **LICENSE**, 6.
18. *Pleading—Payment into court—Conditional plea—Plaintiff's right to withdraw.*

In an action for an account the defendant after setting up a discharge by the plaintiff of his cause of action against the defendant pleaded as follows :—

Pleading—Continued.

"In case this honourable court should be of opinion that the defendant is still liable . . . the defendant now bring into court, etc., the sum of, etc., and states that the same is sufficient, etc. The plaintiff took the money out of court."

Held, Strong, J., dissenting, that this was a payment into court in satisfaction which the plaintiff had a right to retain, notwithstanding his action was dismissed at the hearing.

Held, *per* Strong, J., that this plea only recognized the plaintiff's right to the money in the event of the court deciding that the defendant was not discharged from his liability, but that on the facts presented the plaintiff was entitled to judgment for the same amount as the sum paid into court.

Fraser v. Bell.—xiii. 546.

19. *Statement of claim in Exchequer Court—Insufficiency of—
Appeal in Exchequer Court from order of judge in
Chambers.*

A statement of claim was filed by the Attorney-General for the Province of Ontario in the Exchequer Court of Canada, praying "that it may be declared that the personal property of persons domiciled within the Province of Ontario, dying intestate and leaving no next of kin or other persons entitled thereto other than Her Majesty, belongs to the province or to Her Majesty in trust for the province." The Attorney-General for the Dominion of Canada in answer to the statement of claim made prayed that "it be declared the personal property of persons who have died intestate in Ontario since confederation, leaving no next of kin or other person entitled thereto except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada."

No reply was filed, and on an application to Mr. Justice Gwynne in Chambers for a summons for an order to fix the time and place of trial or hearing, the summons was discharged on the ground that the case did not present a proper case for the decision of the court. A motion was then made before the Exchequer Court, Sir W. J. Ritchie, presiding, by way of appeal from the order of Mr. Justice Gwynne, for an order to fix the time and place of trial. The motion was dismissed without costs, on the ground that he was not prepared to interfere with the order of another judge of the same court.

On appeal to the full court, **Held**, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect.

The Attorney-General of Ontario v. The Attorney-General of Canada.

—xiv. 736.

20. *Libel—Special damages—Loss of custom.*

By s. 11 of the Libel Act of Manitoba, 50 V. c. 22, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed.

Pleading—Continued.

Held, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong, J., where special damages are sought to be recovered in an action of libel, or for verbal slander where the words are actionable *per se*, such special damage must be alleged and pleaded with particularity, and in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is inadmissible.

Ashdown v. Manitoba "Free Press" Company.—xx. 43.

And see PRACTICE, 29.

21. Sale of lands—Non-delivery of portion purchased—Arts. 1501, 1502, C. C.

See SALE OF LANDS, 33.

22. Notice of action—Want of, not pleaded—Municipal corporation—Duty of, to repair streets—34 V. c. 11 (N. B.)—25 V. c. 16 (N.B.).

See MUNICIPAL CORPORATION, 25.

23. Grant by local government of foreshore of harbour—Conveyance by grantee—Claim of dower by wife of grantee—Act of legislature confirming title—Should be pleaded.

See ESTOPPEL, 19.

24. Guarantee by managing owner of bills drawn by master of ship on agents—Misrepresentation, defence of, not available under plea of fraud.

See SHIPS AND SHIPPING, 14.

25. Libel—Pleas of "not guilty" and "fair comment"—Reception of evidence to prove personal dishonesty—Rejection of evidence in rebuttal—General verdict—New trial.

See LIBEL, 8.

Pledge—Of moneys.

See AGREEMENT, 7.

2. *Without delivery—Possession—Rights of creditors—Art. 1970, C. C.*

B., who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company with his own. He bought locomotives which were delivered to, and used openly and publicly by, the railway company as their own property for several years. In January and May, 1883, B., by documents *sous seing privé*, sold with the condition to

Pledge—Continued.

deliver on demand, ten of these locomotive engines to *F. et al.*, the appellants, to guarantee them against an endorsement of his notes for \$50,000, but reserved the right on payment of said notes or any renewals thereof to have said locomotives re-delivered to him. B. having become insolvent, *F. et al.*, by their action directed against B., the South Eastern Railway Company, and *R. et al.*, trustees of the company under 43-44 V. c. 49 (P.Q.), asked for the delivery of the locomotives, which were at the time in the open possession of the South Eastern Railway Company, unless the defendants paid the amount of their debt. B. did not plead. The South Eastern Railway Company and *R. et al.*, as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging he was a judgment creditor of B., notoriously insolvent at the time of making the alleged sale to *F. et al.*

Held, affirming the judgment of the court below, that the transaction with B. only amounted to a pledge not accompanied by delivery, and, therefore, *F. et al.* were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent.

Fairbanks v. Barlow.—xiv. 217.

3. Insolvency—Claim against insolvent—Notes held as collateral security—Collocation—Joint and several liability.

See ASSIGNMENT, 23.

4. Of shares in building society—By-law—Indebtedness to society—Security.

See BY-LAW, 18.

INSOLVENCY, 27.

5. *Opposition à fin de charge—Pledge—Art. 419, C. C.—Agreement—Effect of—Arts. 1977, 2015 & 2094, C. C.*

The respondent obtained against the Montreal and Sorel Railway Company a judgment for the sum of \$675 and costs and having caused a writ of *venditioni exponas* to issue against the railway property of the Montreal and Sorel railway, the appellants, who were in possession and working the railway, claimed under a certain agreement in writing to be entitled to retain possession of the railway property pledged to them for the disbursements they had made on it, and filed an opposition *à fin de charge* for the sum of \$35,000 in the hands of the sheriff. The respondent contested the opposition. The agreement relied on by the appellant company, was entered into between the Montreal and Sorel railway and the appellant company, and stated amongst other things that "the Montreal and Sorel Railway Company was burthened with debts and had neither money nor credit to place the road in running order, etc." The amount claimed for disbursements, etc., was over \$35,000.

The Superior Court, whose judgment was affirmed by the Court of Queen's Bench for Lower Canada, dismissed the opposition *à fin de charge*.

Pledge—Continued.

On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the Court. The Court without deciding the question of jurisdiction heard the appeal on the merits, and it was

Held, 1. That such an agreement must be deemed in law to have been made with intent to defraud and was void as to the anterior creditors of the Montreal and Sorel Railway Company.

2. That as the agreement granting the lien or pledge affected immovable property and had not been registered it was void against the anterior creditors of the Montreal and Sorel Railway Company. Arts. 1977, 2015 & 2094, C. C.

3. That Art. 419, C. C., does not give to a pledgee of an immovable who has not registered his deed a right of retention as against the pledger's execution creditors for the payment of his disbursements on the property pledged, but the pledgee's remedy is by an *opposition à fin de conserver* to be paid out of the proceeds of the judicial sale. Art. 1972, C. C.

The Great Eastern Railway Company v. Lamba.—xxi. 431.

6. Insolvency, knowledge of by creditor—Fraudulent preference—Warehouse receipt—Novation—Arts. 1975, 1034, 1035, 1036, 1169, C. C.

See INSOLVENCY, 32.

Police regulations.

See LEGISLATURE, 10.

Policy.

See INSURANCE, FIRE, LIFE, MARINE.

Possession—Title by.

See LIMITATIONS, 2.

2. As caretaker.

See TENANCY AT WILL.

3. As against wrong-doers—Mixture of logs.

See REPLEVIN, 2.

4. By road trustees.

See ROAD.

5. *Possession fraudulently obtained by defendant—Plaintiff not put on proof of title—Tax sale—Assessment—Sheriff's deed—Court of Chancery, powers of in action of ejectment—R. S. O. c. 40, s. 87; 33 V. c. 23.*

N., respondent, as assignee in insolvency of H., who bought a lot of land from the purchaser at a sheriff's sale for taxes, filed a bill in Chancery under

Possession—Continued.

the Ontario Administration of Justice Act against W. & O'N. (appellants), who were in possession, praying *inter alia* that defendants be ordered to deliver up possession of the lands and to account for the value of trees, etc., cut down and removed. W. by his answer adopted O'N's possession and claimed under conveyance from the Crown and impeached the validity of the sale for taxes. O'N. by his answer alleged he was in possession under W. At the trial it was proved that H. gave a lease of the lot to one T. for four years, and that O'N. went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place and thereby obtained possession for the benefit of W. The Court of Chancery for Ontario held that appellants were obliged to yield up possession to the respondent before asserting any title in themselves. The Court of Appeal for Ontario varied the decree by declaring that the decree was to be without prejudice to any proceeding the appellant W. might be advised to take to establish his title to the lands in question within two months from the date thereof.

Held, per Ritchie, C.J., and Strong, Fournier and Henry, JJ., affirming the judgment of the courts below,—that the appellants, having gone into possession under T., were estopped in this suit from disputing their landlord's title, and that the respondent was entitled to an injunction to restrain appellants from committing waste and to an account for waste already committed.

Per Strong, J.—The decree made by the Chancellor would have constituted no bar to a subsequent action at law or suit in equity by W. to impeach the tax sale, and should not have been varied by the Court of Appeal.

Per Gwynne, J.—The case should have been disposed of upon the issue as to the validity of title upon which the plaintiff had by his bill rested his case; and as the appellants had failed to prove that the taxes had been paid before the sheriff's sale, the Ontario statute, 38 V. c. 23, had removed all errors and defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and pursuant to the provisions of c. 40, s. 87, R. S. O., the respondent was entitled to recover possession of the land in question and to have execution therefor, but not to an order for an injunction or any direction for an account, the statute authorizing title to real property to be tried in a Court of Chancery not justifying a judgment of a more extensive character than would have been pronounced in a court of common law if the action had been brought there.

White v. Nelles.—xi. 587.

6. Of marsh lands—Accretion.

See TRESPASS, 10.

7. *Title by—Limitations—38 V. c. 16 (O.).*

This is an action brought to recover possession of the north half of lot No. 34, in the ninth concession of the township of North Dumfries, in the county of Waterloo, in the Province of Ontario. The respondent is the plaintiff in the action, and claims title to the land as residuary devisee under the last will and testament of Madeline Ross, deceased. The respondent's case is that one Charles Ross was at the time of his death in 1864 the owner in fee of the

Possession—Continued.

above lands. He died intestate leaving him surviving his widow Madeline Ross, but no issue. After the death of Charles his widow remained in possession and occupation, by herself, or her tenants, of the whole premises up to the time of her death on the 6th October, 1881. By an indenture of lease dated the 3rd day of May, 1881, she demised the premises to the defendant Oliver for the period of five years to be computed from the first day of April, 1881, and at the time of her death Oliver was in possession of the premises as tenant under such lease.

The plaintiff had for some years resided with Mrs. Ross in the house on the premises, and continued to reside there some time after Mrs. Ross's death. She subsequently left the premises, leaving the tenant Oliver in possession.

The defendant Ross, pretending to be one of the heirs-at-law of the late Charles Ross, shortly after the death of Mrs. Ross, procured through a solicitor the defendant Oliver to accept from him a lease of the premises for the period of one year, and to attorn to him as landlord.

The respondent on the 24th of October, 1882, commenced this action against the defendant Oliver (who was then in possession of the said land) claiming title thereto as residuary devisee under the last will and testament of Madeline Ross, who had acquired a title by length of possession subsequent to the death of her husband the said Charles Ross. The defendant Ross, having obtained an order allowing him to defend as landlord, was made a defendant in the action. In his statement of defence he claimed title to the premises as one of the heirs-at-law of the late Charles Ross, and alleged an agreement made by Madeline Ross with the heirs-at-law by which Madeline Ross had been permitted to occupy the land by way of an assignment of dower for her life, and that she had occupied as caretaker, and by virtue of such agreement, and that her occupation was not adverse to his title, or that of the other heirs-at-law.

At the trial the Judge entered a verdict for the defendant. The plaintiff then moved before the full Court of the Queen's Bench Division to set aside this verdict, and to enter judgment for the plaintiff; upon which motion, after hearing argument, the Court unanimously set aside the verdict for the defendants, and directed judgment to be entered for the plaintiff.

From this judgment the appellant Ross appealed to the Court of Appeal for Ontario, which Court, after hearing, and at the close of the argument, unanimously dismissed the appeal and affirmed the judgment of the Court below.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgments of the Courts below, that there was no evidence of an agreement between the heirs-at-law of Charles Ross and his widow that she should occupy the land during her life in lieu of dower, and nothing to show that the heirs could not have brought an action and recovered the land at any time between the death of Charles Ross and the 1st day of July, 1877, when their right and title were extinguished or ceased by virtue of the Statute of Ontario, 38 V. c. 16. Appeal dismissed with costs.

Oliver v. Johnston.—9th April, 1886.

Possession—Continued.**8. Title by—Failure to establish—Insolvent Act of 1875, ss. 68, 75—Fraudulent conveyance.**

In an action of ejectment the plaintiff claimed title under F., a grantee of S., the assignee in insolvency of P. D., who formerly owned the land, and who some years before his insolvency had conveyed the land to his brother L. D. S., under the advice of the inspectors of the estate, refused to take proceedings to set aside the conveyance to L. D. as fraudulent, and two of the creditors, under the provisions of s. 68 of the Act, having obtained leave from the insolvency judge instituted a suit in the name of S., and procured a decree declaring the conveyance to L. D. fraudulent, and, as against S., void. The decree did not direct a sale of the land, as was prayed. The land was, however, advertised for sale, the period of advertisement being shortened by the judge, and was sold to F.; S., under instructions from the general body of creditors at first refused to convey to F., but subsequently conveyed upon an order being obtained from the judge directing him to do so.

It was held by the Court of Appeal for Ontario, 12 Ont. App. R. 298, affirming the decision of the C. P. Div., 9 Ont. R. 89, that the sale was not one subject to the control of the general body of creditors, and therefore the restrictions of s. 75 of the Act were inapplicable and the sale was valid. Further, that the defendant failed to establish his claim of title by possession.

On appeal to the Supreme Court of Canada, **Held**, that the judgment of the court below should be affirmed.

Appeal dismissed with costs.

Herbert v. Donovan.—April 9, 1886.

9. Title by—Statute of Limitations—Possession of tenant of owner of life estate as against remainder-man.

By a deed to trustees in 1837, two lots of land were conveyed in trust for E. A. for her life, with the remainder as follows: Lot No. 2 to G. A., and lot No. 1 to A. A., to the use of them, their heirs and assigns, as joint-tenants and not as tenants in common. E. A., the tenant for life, entered into possession of lot No. 2, and in 1862 put her son, the husband of the defendant into possession without exacting any rent. The son died a few months after, and the defendant, his widow, continued in possession of the lot, and was in possession in 1875, when the tenant for life died. In 1878, A. A., the plaintiff, obtained a deed of the legal estate in the two lots from the executors of the surviving trustee (G. A. having died a number of years before) and brought an action against the defendant for the recovery of the said lot No. 2.

Held, affirming the judgment of the court below, 7 Ont. App. R. 592; 2 C. L. T. 544, that as there was no time prior to the death of the tenant for life when either the trustees or those entitled in remainder could have interfered with the possession of the lot, the Statute of Limitations did not begin to run against the remainder-man until the death of the tenant for life in 1875, and he was therefore entitled to recover.

Held, also, that for the purposes of the action it was immaterial whether the plaintiff was entitled to the whole lot by survivorship on the termination.

Possession—Continued.

of the joint tenancy by the death of his brother, or only to his portion of the lot as one of his brother's heirs.

Adamson v. Adamson.—xii. 563.

10. Title to Land—Possession—Nature of—Statute of limitations—Evidence.

In an action against O. to recover possession of land it was shown that O. had been in possession for over twenty years; that he was originally in as caretaker for one of the owners; that afterwards the property was severed by judicial decree and such owner was ordered to convey certain portions to the others; that after the severance O. performed acts showing that he was still acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways.

Held, reversing the judgment of the Court of Appeal and restoring that of Rose, J., at the trial, that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker and he had acquired no title by possession. *Ryan v. Ryan*, 5 Can. S. C. R. 487 [see *Tenancy at Will*], followed.

Heward v. O'Donohoe.—xix. 341.

11. Action for recovery of land against husband and wife—Allegation of possession in wife—Sale by sheriff as against husband—Irregularities in—Trial of action after pleadings maintained on demurrer.

See EJECTMENT, 5.

12. Sale of lands in hands of executors by sheriff for note given by one of the executors endorsed by testator—Purchase by executor—Possession taken by devisee of the lands—Trust—Statute of limitations.

See TRUSTS AND TRUSTEES, 24.

13. Devise to children and their issue—Possession of lands of estate taken by a son appointed executor and trustee, but who had not proved will nor disclaimed—Consent of acting executor and trustee—Statute of limitations.

See WILL, 23.

Possessory Action.—Equivocal possession—Right of way.

In a possessory action brought by P. against H., the latter denied H.'s possession and pleaded *inter alia* that he was proprietor and had exercised a right of way over the lands in dispute for a number of years. The land in

Possessory Action—Continued.

dispute consisted of a roadway situated between the adjoining properties of the plaintiff and defendant.

At the trial P. (the defendant) put in his title. H. (plaintiff) proved that he had had possession for a year by closing up the roadway with a fence and putting his cattle there, and that at times he allowed the defendant and others to use the roadway to get to the river, but that when defendant took down the fence he immediately restored it, and that defendant then asked him to let him use it. That it was after the defendant had again taken forcible possession of the land that he instituted against him the present action. The courts below held that both parties had only proved an equivocal possession and dismissed the plaintiff's action, ordering that their rights should be tried by an action *au pétitoire*.

On appeal to the Supreme Court of Canada, **Held**, Fournier, J., dissenting, that as P. had proved a possession *animo domini* for a year and a day, he should be reinstated and maintained in peaceable possession of the land, and H. be forbidden to trouble him by exercising a right of way over the land in question, reserving to the latter his recourse to revendicate *au pétitoire* any right he might have.

Appeal allowed with costs.

Pinsonneault v. Hebert.—8th March, 1886.—xiii. 450.

Power of Attorney—To sell land.

See SALE OF LANDS, 5.

2. To sell mortgaged lands—Sale of, on credit—Application of proceeds—Duty of purchaser.

See MORTGAGE, 21.

3. *Construction of—Authority to settle and adjust claim—Right to receive payment under.*

A crew of sailors claiming salvage from the owners of a vessel picked up at sea gave a power of attorney to P. authorizing him to bring suit or otherwise settle and adjust any claim which they might have for salvage services, etc.

Held, affirming the decision of the local judge in admiralty, that P. was not authorized to receive payment of the sum awarded for salvage or to apportion the respective shares of the sailors therein.

Taschereau, J., took no part in judgment, entertaining doubts as to the jurisdiction of the court to hear the appeal.

Churchill v. McKay—In re The Ship "Quebec."—xx. 472.

Power of Sale.—In mortgage, exercised after foreclosure.

See MORTGAGE, 15.

Practice—Parties—Amending record.

Under the practice in Nova Scotia, where the wife is improperly joined as co-plaintiff with the husband, the suit does not abate, but the wife's name must be struck out of the record.

Caldwell v. Stadacona F. & L. Ins. Co.—12th January, 1883.—xi. 212.

- 1a. Contempt of Court—Practice in case of—Judgment not final—
R. S. C. c. 135, s. 24 (a).

See JURISDICTION, 53.

2. Railway Co.—Bonus—Action against municipality—Specific performance—Counter claim—Damages.

See RAILWAYS AND RAILWAY COMPANIES, 42.

3. *Hypothecary action—Judgment in—Art. 2075, C. C.—Service of judgment—Art. 476, C. C. P. and C. S. L. C. c. 49, s. 15—Waiver.*

By a judgment *en déclaration d'hypothèque* certain property in the possession and ownership of respondents was declared hypothecated in favour of the appellant in the sum of \$5,200 and interest and costs; they were condemned to surrender the same in order that it might be judicially sold to satisfy the judgment, unless they preferred to pay to appellant the amount of the judgment. By the judgment it was also decreed that the option should be made within forty days of the service to be made upon them of the judgment, and in default of their so doing within the said delay that the respondents be condemned to pay to the appellant the amount of the judgment. This judgment (the respondents residing in Scotland and having no domicile in Canada) was served at the prothonotary's office and on the respondents' attorneys. After the delay of forty days, no choice or option having been made, the appellant caused a writ of *fi. fa. de terris* to issue against the respondents for the full amount of the judgment. The sheriff first seized the property hypothecated, sold it and handed over the proceeds to a prior mortgagee. Another writ of *fi. fa. de terris* was then issued and other realty belonging to the respondents was seized. To this second seizure the respondents filed an opposition *d'fa d'annuler*, claiming that the judgment had not been served on them and that they were not personally liable for the debt due to appellant.

Held,—1st. Reversing the judgment of the court below, that it is not necessary to serve a judgment *en déclaration d'hypothèque* on a defendant who is absent from the Province and has no domicile. Art. 476, C. C. P. and C. S. L. C. c. 49, s. 15.

2nd. That the respondents, by not opposing the first seizure of their property, had waived any irregularity (if any) as to the service of the judgment.

3rd. That in an action *en déclaration d'hypothèque* the defendant may, in default of his surrendering the property within the period fixed by the court, be personally condemned to pay the full amount of the plaintiff's claim. Art. 2075, C. C.

Dubuc v. Kidston.—xvi. 357.

Practice—Continued.**4. Parties to action—Sale of personal rights—Warranty.**

See VENDOR AND PURCHASER, 2.

5. Action for libel—Newspaper publication—Lost MSS.—Proof of handwriting—Change of signature—Cross-examination—Nature of.

See EVIDENCE, 39.

6. Railway Co.—Carriage of goods—Claim for loss—Limitation of time—Demurrer—Acquiescence in judgment—Res judicata—Partial loss—Joint tort-feasors—Release to one—Effect of.

A condition of a contract for carriage of goods by railway provided that no claim for damages to, loss of, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made.

Held, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*.

Held also, —Per Strong, J., Gwynne, J., contra, that part of the consignment having been lost such notice should have been given in respect to the same within thirty-six hours after the delivery of the goods which arrived safely.

Quære.—In the present state of the law is a release to, or satisfaction from one of several joint tort-feasors, a bar to an action against the others?

Grand Trunk Railway Company of Canada v. McMillan.—xvi. 548.

AND *See* RAILWAYS AND RAILWAY COMPANIES, 43.

7. Capias—Bail, discharge of for delay in not entering judgment—Order in discretion of court below—Practice—No Appeal.

See JURISDICTION, 61.

8. Warehouse receipts—Parol agreement as to disposal of surplus from sale of goods—Action by creditor—Parties—Banking Act—R. S. C. c. 120, s. 53 *et seq.*

See BANKS AND BANKING, 18.

9. Set off—Not pleaded in action—Right to set-off judgment—Equitable assignment.

See SET-OFF, 3.

Practice—Continued.

10. *Art. 451, C. C. P.—Retraxit—Subsequent action—Document not proved at trial—Consideration of in appeal—Lis pendens and Res judicata—Pleas of.*

The Exchange Bank of Canada, in an action instituted by them against G., filed a withdrawal of a part of their demand in open court reserving their right to institute a subsequent action for the amount so withdrawn. The court acted on this *retraxit*, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved :

Held, reversing the judgment of the court below, Fournier, J., dissenting, that the provisions of Art. 451, C. C. P. are applicable to a withdrawal made outside, and without the interference of, the court and cannot affect the validity of a withdrawal made in open court and with its permission.

2. That it was too late in the second action to question the validity of the *retraxit* upon which the court had in the first action acted and rendered a judgment which was final and conclusive.

A document not proved at the trial but relied on in the Court of Queen's Bench for the first time cannot be relied on or made part of the case in appeal. *Montreal L. & M. Co. v. Fauteux*, 3 Can. S. C. R. 433, and *Lionais v. Molson's Bank*, 10 Can. S. C. R. 527, followed.

Exchange Bank of Canada v. Gilman.—xvii. 108.

11. *Libel—Trial of action—Improper direction to jury—Excessive damages—Reduction of verdict.*

Held, *per* Strong, Fournier, Taschereau and Gwynne, JJ., that where on the trial of an action for libel the case was improperly left to the jury, but the only prejudice occasioned to the defendant thereby was that of excessive damages, the verdict might stand on the plaintiff consenting to the damages being reduced to a sum named by the court.

Held, *per* Ritchie, C.J., that there had been a mis-trial and the consent of both parties to such reduction was necessary.

Higgins v. Walkem.—xvii. 225.

12. *Winding-up Act—Procedure under—Use of ordinary machinery of court—Security—Reference to master to settle.*

In assigning to provincial courts or judges certain functions under the Winding-up Act, Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master.

Shoolbred v. Clarke.—xvii. 265.

Practice—Continued.**13. Writ of execution—Signature of prothonotary—Seal of court.**

In the Province of Nova Scotia writs of execution need not be signed by the prothonotary of the court. It is the seal of the court which gives validity to such writs, not the signature of the officer.

Archibald v. Hubley.—xviii. 116.

See CHATTEL MORTGAGE, 11.

14. Tierce-opposition to a judgment—Interest of opposant—Intervention—Sale of litigious rights—Arts. 1485, 989, 990, 1583 C. C.—Arts. 154, 510, C. P. C.—Judgment—When action was prescribed—Arts. 2216, 2243, 2265, 2187, C. C.

P. having filed a *tierce-opposition* to a judgment obtained by the Attorney-General of the Province of Quebec in 1884, in a suit commenced by information in 1790 against the succession of one M.P. in order to have the judgment set aside on the ground that it declared escheated to the Crown a part of the Seignior of Grondines, of which he (P.) had been in possession for a great number of years, and which judgment it was alleged had been obtained illegally and by fraud and collusion, one M., an advocate, who had purchased all the rights of the Crown in the said succession, intervened and asked for the dismissal of the *tierce-opposition*. The Attorney-General and the curator to the succession of M. P., the only parties to the judgment sought to be set aside, in answer to P.'s *tierce-opposition* merely appeared and declared that: "*ils s'en rapportent à justice.*" Upon the issues being joined on the *tierce-opposition* and on the intervention and evidence taken, the Superior Court dismissed M.'s intervention and maintained P.'s *tierce-opposition*. On appeal to the Court of Queen's Bench by the Crown and M. jointly, this judgment was reversed, and P.'s *tierce-opposition* was dismissed. On appeal to the Supreme Court of Canada:

Held, reversing the judgment of the court below, 1st. That M. had no *locus standi* to intervene, the sale to him of the Crown's rights being void (a) because it was a sale of litigious rights to an advocate prohibited by Arts. 1485 & 1583, C. C., and therefore null under Arts. 14 & 990 C. C.; (b) because it was tainted with champerty, Arts. 14, 989, 990, C. C.; (c) because M. admitted he had no interest in the case, Art. 154, C. P. C.

2nd. That P., being in possession of the property, declared escheated to the Crown in a proceeding to which he was not a party had a sufficient interest under the circumstances in the case to file a *tierce-opposition*, and that the judgment of 1884 should be set aside because *inter alia*, (a) it was obtained by fraud and collusion: (b) the action being prescribed in 1884 (Arts. 2216, 2242, 2265, C. C.), P., under Art. 2187, had the right to avail himself of this prescription.

Fournier, J., dissenting on the ground that P., not having alleged or shown a right superior to that of the Crown, his *tierce-opposition* should be dismissed.

Price v. Mercier.—xviii. 303.

Practice—Continued.

15. Arbitration—Award made rule of court—Time for applying to set it aside—9 & 10 W. III. c. 15, s. 2—R.S.O. (1887) c. 53, s. 37.

See ARBITRATION AND AWARD, 22.

16. Criminal trial—Causing jurors to stand aside—Right of Crown after perusal of panel—Form of prisoner's remedy—Case reserved—Writ of error.

See CRIMINAL APPEAL, 18.

17. Admission of evidence — Cross examination — Conversation partly given on examination in chief—Evidence of counsel

See EVIDENCE, 50.

18. Tender of evidence—Grounds urged at trial—New grounds relied on in appeal.

See EVIDENCE, 51.

19. *Practice—Nova Scotia Judicature Act, rule 476—Motion for new trial—Disposal of whole case on—Directions to jury—Observations by judge on issue not pleaded—Proper case for dispensing with jury.*

In an action for winding-up a partnership in the gold mining business the defence pleaded was that there never was a partnership formed between the plaintiff and the defendants, or, if there was, that it had been put an end to by a verbal agreement between the parties. The case was tried by a jury and the result depended on the credibility to be attached to the respective witnesses on each side who gave evidence as to the agreement that had been entered into. No issue of fraud was raised by the defendants but the trial judge, in charging the jury, made strong observations in respect to fraudulent concealment of facts from the plaintiff and submitted questions to the jury calling for findings in relation to such fraud. The plaintiff having obtained a verdict which was sustained by the Supreme Court of Nova Scotia:

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that there should be a new trial.

Per Gwynne, J., unless either party desires to give further evidence the court should render the judgment on the evidence as it stands which the court below ought to have given.

Per Strong, J., under rule 476 of the Judicature Act the court can take a case which has been passed upon by a jury into its own hands and dispose of it if all the proper materials on which to decide are before it, but in this case the materials essential to the final disposition of the case are not before the court and there must be a new trial.

Per Ritchie, C.J.—The Supreme Court, as an appellate court for the Dominion, should not approve of such strong observations being made by a

Practice—Continued.

judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings and not legitimately in issue in the cause.

Per Strong, Fournier, Taschereau, Gwynne and Patterson, JJ., that the case was essentially an equity case and one in which a jury could advantageously have been dispensed with.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Hardman v. Putnam.—Feb'y. 18, 1891.—xviii. 714.

20. Charge to jury—Misdirection—New trial—Taking accounts.

W., a trader, being in financial difficulties assigned all his property to B. who undertook to arrange with W.'s creditors. W. subsequently assigned his property in trust for the benefit of his creditors and the assignee and some of the creditors brought an action to have the transfer to B. set aside. On the trial, after the evidence on both sides was concluded, plaintiff's counsel asked the judge to instruct the jury as to what constituted fraud under the Statute of Elizabeth, and he also urged that an account should be taken of the dealings between W. and B. The judge refused to define fraud to the jury as requested and the jury stated that they were unable to deal with the accounts. Judgment having been given for the defendants and affirmed by the full court.

Held, that the refusal of the judge to charge the jury as requested amounted to misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts; and that it could be more properly dealt with as an equity case,

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Griffiths v. Boscowitz.—16th June, 1891.—xviii. 718.

21. Receipt—Error—Parol evidence—Arts. 14, 1234, C. C.

The prohibition of Art. 1234, C. C. against the admission of parol evidence to contradict or vary a written instrument, is not *d'ordre public*, and if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a court of appeal.

Parol evidence in commercial matters is admissible against a written document to prove error. *Aetna Insurance Company v. Brodie*, 5 Can. S. C. R. 1, followed.

Schwarsenski v. Vineberg.—xix. 243.

And see EVIDENCE, 58.

22. Action of damages for death—Prescription—Plea of.

In an action by a widow for compensation for the death of her husband from injuries received in the employ of the defendants.

Held, Fournier, J., dissenting, that at the time of the husband's death all right of action was prescribed under Art. 2262, C. C., and the prescription was one to which the courts were bound to give effect although it was not pleaded.

The Canadian Pacific Railway Co. v. Robinson.—xix. 292.

[Reversed by the J. C. of the P. C., (1892) A. C. 491].

See ACTION, 8.

Practice—Continued.

23. Solicitor—Bill of costs—Reference to taxing officer—Procedure—Jurisdiction of Supreme Court in matter of procedure.

See SOLICITOR AND CLIENT, 7.

24. Specially endorsed writ—Order for summary judgment—Appeal.

See JURISDICTION, 89.

25. *Parties to suit—Assignment of chose in action—Demurrer—Res judicata.*

C. by instrument under seal assigned to defendant, as security for moneys due, his interest in certain policies of insurance on which he had actions pending. C. afterwards gave to B. & Co. an order on defendant for the balance of the insurance money that would remain after paying his debt to defendant. B. & Co. endorsed the order and delivered it to plaintiff by whom it was presented to the defendant, who wrote his name across its face. B. & Co. afterwards delivered to plaintiff a document signed by them stating that, having been informed that the endorsed order was not negotiable by endorsement, to perfect plaintiff's title and enable him to obtain the money in defendant's hands, they assigned and transferred their interest therein and appointed plaintiff their attorney, in their name, but for his own use and benefit, to collect the same.

The defendant having received the amounts due C. on the insurance policies informed plaintiff, on his demanding an account, that there were prior claims that would absorb it all. Plaintiff then filed a bill in equity for an account and payment of the amount found due him to which defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that an account between B. & Co. and C. being necessary to protect C.'s rights, C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill.

Held, affirming the judgment of the Supreme Court of N. B., Strong and Patterson, JJ., dissenting, that the question of want of parties was *res judicata* by the judgment on the demurrer and could not be raised again by the answer. Even if it could the judgment was right as C. was not a necessary party. As between plaintiff and defendant the order was an absolute transfer of the fund to be received by defendant, and was treated by all the parties as a negotiable instrument. Defendant had nothing to do with the equities between C. and B. & Co., or between B. & Co. and plaintiff, but was bound to account to plaintiff in accordance with his undertaking as indicated by the acceptance of the order.

McKean v. Jones.—xix. 489.

Practice—Continued.

26. *Election petition—Preliminary objections—R. S. C. c. 9, s. 63—English general rules—Copy of petition—R. S. C. c. 9, s. 9 (b)—Description and occupation of petitioner.*

Held, affirming the judgment of the court below, that the judges of the court in Manitoba not having made rules for the practice and procedure in controverted elections the English rules of Michaelmas Term, 1868, were in force, (R. S. C. c. 9, s. 63), and that under rule one of said English rules the petitioner, when filing an election petition, is bound to leave a copy with the clerk of the court to be sent to the returning officer, and that his failure to do so is the subject of a substantial preliminary objection and fatal to the petition. Strong and Gwynne, JJ., dissenting.

Held, further, reversing the judgment of the court below, that the omission to set out in the petition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and is therefore not fatal.

Lisgar Election Case, Collins v. Ross.—xx. 1.

27. *Election petition—Preliminary objections—Personal service at Ottawa—Security—Receipt—R. S. C. c. 9, ss. 8 & 9, s-ss. e & g, and s. 10.*

In Prince Edward two members are returned for the Electoral District of Queen's County. With an election petition against the return of the two sitting members the petitioner deposited the sum of \$2,000 with the deputy prothonotary of the court, and in the notice of presentation of petition and deposit of security he stated that he had given security to the amount of one thousand dollars for each respondent "in all two thousand dollars" duly deposited with the prothonotary as required by statute. The receipt was signed by W. A. Weeks, the deputy prothonotary appointed by the judges, and acknowledged the receipt of \$2,000, without stating that \$1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa.

Held, 1. That personal service of an election petition at Ottawa without an order of the court is a good service under s. 10 of the Controverted Elections Act.

2. That there being at the time of the presentation of the petition security to the amount of \$1,000 for the costs of each respondent the security given was sufficient. S. 8 and s. 9, ss. (e) c. 9, R. S. C.

3. That the payment of the money to the deputy prothonotary of the court at Charlottetown was a valid payment. S. 9 ss. (g) c. 9, R. S. C.

Queen's County and Prince County (P. E. I.), Election Cases.—xx. 26.

28. *Election petition—Re-service of—Order granting extension of time—Preliminary objections—R. S. C. c. 9, s. 10—Description of petitioner.*

On the 15th April, 1891, the petitioner omitted to served on the appellant with the election petition in this case a copy of the deposit receipt, but on

Practice—Continued.

the 20th of April applied to a judge to extend the time for service that he might cure the omission. An order extending the time, subsequently affirmed on appeal by the Court of Appeal for Ontario, was made and the petition was reserved accordingly with all the other papers prescribed by the statute. Before the order extending the time had been drawn up the respondent had filed preliminary objections, and by leave contained in the order he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction of the Court of Appeal, or a judge thereof, to extend the time for service of the petition beyond the five days prescribed by the Act.

Held, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service. R. S. C. c. 9, s. 10.

The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation, and it was shown by affidavit that there are two or three other persons of that name on the voters' list for that township.

Held, affirming the judgment of the court, below, that the petition should not be dismissed for the want of a more particular description of the petitioner.

Glengarry Election Case (McLennan v. Chisholm).—xx. 38.

29. Affidavit or affirmation—Commissioner—Presumption of authority—Persons having religious scruples—Libel—Malice or negligence—Disagreement of jury—50 V. cc. 22 & 23 (Man.).

The Act respecting newspapers in Manitoba (50 V. c. 23), provides that no person shall print or publish a newspaper until an affidavit or affirmation, containing such matter as the Act directs is deposited with the prothonotary of the court and that such affidavit or affirmation may be taken before a justice or commissioner.

Held, that such affidavit or affirmation, if a corporation is proprietor of the newspaper, may be made by the managing director; that there is an option either to swear or affirm and the right to affirm is not confined to members of certain religious bodies or persons having religious scruples; and that if the affidavit or affirmation purport to have been taken before a commissioner his authority will be presumed.

By s. 11 of the Libel Act of Manitoba (50 V. c. 23), actual malice or culpable negligence must be proved in an action for libel, unless special damages are claimed.

Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Ashdown v. Manitoba "Free Press" Company.—xx. 43.

And see PLEADING, 20.

Practice—Continued.**30. Trespass to land—Title—New trial—Misdirection—Misconduct of party at view of premises—Nominal damages.**

See TRESPASS, 20.

31. Election petition—Preliminary examination—Order to postpone until after session of Parliament—Six months' limit.

On motion for preliminary examination of the respondent to an election petition the court ordered, at respondent's instance, that he was not to appear until after the current session of Parliament.

Held, reversing the judgment of the election judges, that the order was, in effect, an enlargement of the time for the commencement of the trial until after the session, the time occupied by which was not to be computed as part of the six months' limit. *R. S. C. c. 9, s. 62.*

Laprairie Election Case (Gibeault v. Pelletier.)—xx. 185.

32. Election petition—Preliminary objections—Deposit of security—*R. S. C. c. 9, s. 9 (f).*

The preliminary objection in this case was that the security and deposit receipt were illegal, null and void, the written receipt signed by the prothonotary of the court being as follows:—"That the security required by law had been given on behalf of the petitioners by a sum of \$1,000 in a Dominion note, to wit, a bank note of \$1,000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute of the Dominion of Canada now in force." The deposit was in fact a Dominion note of \$1,000.

Held, affirming the judgment of the court below, that the deposit and receipt complied sufficiently with s. 9 (f) of the Dominion Controverted Elections Act.

Argenteuil Election Case (Christie v. Morrison.)—xx. 194.

33. Election petition—Status of petitioner—When to be determined—*R. S. C. c. 9, ss. 12 & 13.*

In this case the respondent, by preliminary objection, objected to the status of the petitioner, and the case being at issue copies of the voters' lists for said electoral district were filed but no other evidence offered, and the court set aside the preliminary objection "without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision and the case went to trial, where the objection was renewed but was overruled by the trial judges who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court of Canada on the ground that the onus was on the respondents to prove their status, and that their status had not been proved.

Held, affirming the judgment of the court below, that the objection raising the question of the qualification of the petitioner was properly raised by preli-

Practice—Continued.

minary objection and disposed of, and the judges at the trial had no jurisdiction to entertain such objection. R. S. C. c. 9, ss. 12 & 13.

Prescott Election Case (Proulx v. Fraser).—xx. 196.

34. Lessor and lessee—Amount claimed—Arts. 887 & 888, C. C. P.—Jurisdiction.

Held, affirming the judgment of the court below, Fournier, J., dissenting, that where in an action brought by the lessor under Arts. 887 & 888, C. C. P. to recover possession of premises a demand of \$46 is joined for their use and occupation since the expiration of the lease such action must be brought in the Circuit Court, the amount claimed being under \$100.

Blachford v. McBain.—xx. 269.

35. Action against Provincial Government—Amending style of cause by order of Supreme Court when appeal brought on for hearing.

See PRACTICE OF SUPREME COURT, 30.

36. Appeal—Intervention—Abandonment of appeal by not appealing to intermediate Court of Appeal.

See JURISDICTION, 94.

37. Partition—Parties to suit.

See WILL, 21.

38. Election petition—Enlargement of time for commencement of trial—Notice of trial—Shorthand writer's notes—R. S. C. c. 9, ss. 31, 33, 50 (b).

On the 10th October, 1891, the judge on the trial of an election petition, within six months after the filing of the petition, by order enlarged the time for the commencement of the trial to the 4th November; the six months expiring on the 18th October. On the 19th October another order was made by the judge fixing the date of the trial for the 4th November, 1891, and fourteen clear days' notice of trial was given. The respondent objected to the jurisdiction of the court.

Held, that the orders made were valid. Sections 31, 33, c. 9, R. S. C.

Held, also, 1. That the objection to the sufficiency of the notice of trial given in this case under section 31 of c. 9, R. S. C. was not an objection which could be relied on in an appeal under section 50 (b) of c. 9, R. S. C.

2. That evidence taken by a shorthand writer not an official stenographer of the court, but who has been sworn and appointed by the judge, need not be read over to the witnesses when extended.

Pontiac Election Case. (Murray v. Lyon.)—xx. 626.

Practice—Continued.

39. Action in disavowal—Appearance by attorney—Service of summons—C. S. L. C. c. 83, s. 44—Parties to suit.

See APPEAL, 83.

40. Administration proceedings — Proving claim on promissory notes held under agreement to divide proceeds with original holder—ChamPERTY—Subsequent proof by original holder of notes—Right to come in under administration order—Statute of Limitations.

See CHAMPERTY.

41. Misdirection—New trial ordered by court below—Interference with order for—Negligence—Damage by fire — Spark arrester.

See MISDIRECTION, 5.

42. Mortgagor and mortgagee—Foreclosure of mortgage—Practice —Addition of parties—Lessee of mortgagor—Protection of interest of—Staying proceedings—Order of sale of mortgaged lands.

See MORTGAGE, 36.

43. *Practice—Master's office—Reference to assess damages—Severance of damages—Joint tort-feasors—Reasons for report—Judgment of Court—Equal division—Withholding judgment.*

R. brought an action against several mill owners on the Ottawa River for damage to his business as an owner and letter of boats caused by sawdust and mill refuse being thrown into the river and accumulating so as to obstruct navigation, and he claimed that he was not only prevented from sailing his boats on the river but his customers who hired boats left him on account of the sawdust and refuse accumulating in front of the boathouse. On the trial judgment was given for the defendants but was reversed by the Court of Appeal and by the Privy Council, and a reference to a master was ordered to assess the damages. Before the master, defendants claimed that other mill owners not proceeded against in the action had contributed to the alleged nuisance and that the report should show the amount of damage caused by each defendant, also the amount of damage to R. under each head of injury claimed. The defendants offered evidence to show that the loss of custom to R. in letting boats arose from the change in public taste, customers preferring the canal to the river, and plaintiff gave evidence in rebuttal some of which defendants alleged to be irrelevant. The master having reported generally awarding R. \$1,000 damages against each of the defendants, an appeal was

Practice—Continued.

taken against the report resulting in its being affirmed by the Chancellor of Ontario and in the Court of Appeal for Ontario two of the four judges of the latter court being in favour of confirming the report, and the other two giving no judgment on the ground that they could not come to any conclusion without being furnished with the reasons of the master for his report. On appeal by defendants to the Supreme Court, in addition to the objections to the report it was argued that the Court of Appeal gave no judgment.

Held, that the master properly treated defendants as joint tort-feasors and was not obliged to give reasons for his report, provided he sufficiently followed the directions in the decree; and that he was not obliged to sever the damages either to show the liability of each defendant or the amount due plaintiff under each head of damage claimed.

Held, further, that the master was the final judge as to the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have been admitted of a character not likely to have affected his judgment, especially as no appeal was taken from his ruling on the evidence.

Held, also, that this court should not go behind the formal judgment of the court appealed from which stated that the appeal was dismissed. Moreover the position was the same as if the judges of the Court of Appeal had been equally divided in opinion in which case the appeal would have been properly dismissed.

Booth v. Ratte —18th December, 1892.—xxi. 637.

44. Of Supreme Court of New Brunswick—All questions of fact to be tried by jury—Reference to court by consent of parties makes the court a private tribunal from which no appeal lies.

See JURISDICTION, 109.

See also COSTS.

PLEADING.**Practice of Supreme Court—**

Affidavit—As to matter in dispute, 116, 117.

Agents, 1, 2.

Allowance of Appeal, 138 (and see Appeal and Security).

Amendment, 3.

of case, 14-20, 24, 30.

of Judgment, 105-110.

Appeal, direct, 4-12.

by leave, 13.

Case, 14-30 (a).

Certiorari, 31, 32.

Costs, 33-50, 111 (and see Security).

Counsel, 51-59.

Practice of Supreme Court—Continued.

Cross Appeal, 52, 53, 60-63.
Discontinuance, 64.
Dismissing Appeal, 65-72.
Election Appeal, 64, 70-72, 82, 89, 90, 115.
Factum, 66, 73-84.
Fees, 85 (and see *Costs*).
Habeas Corpus, 86, 94, 146.
Hearing, 87-95.
Inscription, 66, 96, 97.
Interest, 98-100.
Judgment, 101-115.
Matter in dispute, 116, 117.
Notice of Appeal, 118, 119.
Parties, 10, 120, 121.
Printing, 21, 22, 23.
Privy Council, 111, 122, 123.
Quashing Appeal, 44, 61, 124.
Reversal of Judgment, 115.
Security, 5, 6, 125-139, 143.
Technical objection, 140.
Time, 141, 147, 149.
Vacation, 148, 149.

1. Agents—Appointing.

Conducting business with the Registrar's office by correspondence is an irregular practice. A solicitor should appoint an agent as required by the Supreme and Exchequer Court rules.

Wallace v. Burkner.—May 2, 1883.

2. Agents—Authority to enter name of.

A written authority should be filed with the Registrar authorizing either him or a solicitor to enter the name of the agent in the agent's book, when the principal does not enter the name himself.

Per Ritchie, C.J., in chambers.

3. Amendment, generally.

See AMENDMENT.

4. Appeal direct from court of original jurisdiction—S. C. A. Act, 1879, s. 6.

The Chief Justice of the Supreme Court, under s. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of

Practice of Supreme Court—*Continued*.

Canada, it being known that there were then only two judges on the bench in Manitoba, the Chief Justice who was plaintiff in the cause, and Dubuc, J., from whose decree the appeal was brought.

Schultz v. Wood.—vi. 585.

5. *Appeal direct from court of original jurisdiction—S. C. A. Act, 1879, ss. 6 & 14—S. & E. C. Act, ss. 25 & 26—Security.*

An appeal from the court of original jurisdiction may be allowed by the Supreme Court or a judge thereof, under s. 6 of the S. C. A. Act, 1879, although the judgment appealed from has been pronounced, entered or signed more than thirty days before the date of the application.

Bank B. N. America v. Walker.—22nd June, 1883.

6. But, semble, an application to the Supreme Court or a judge thereof, to be allowed to give security under s. 31, S. & E. C. Act, as amended by s. 14, S. C. A. Act 1879, should be within the time limited by s. 25 of the S. & E. C. Act or further time allowed by a judge of the court below under s. 26, S. & E. C. Act.

Walmsley v. Griffiths.—*Per Ritchie, C.J.*, in chambers.—14th January, 1885.

7. *Appeal direct from court of original jurisdiction—S. C. A. Act, 1879, s. 6—Court of final resort in B. C.*

Application for leave to appeal direct from the judgment of Sir M. B. Begbie, C.J., of British Columbia, pronounced on the 11th July, 1881, without any intermediate appeal to any court in the Province.

The affidavit of the solicitor of the appellant, after stating the nature of the case, set out that the Supreme Court of British Columbia, being the court of final resort in the Province, consisted of five judges, the Chief Justice and four puisné judges; that two of the judges had been engaged as counsel in the cause prior to their elevation to the bench, and refused to exercise judicial functions in such cause; that another judge was absent from the Province and had been so for several months, there was no news of his return, and the deponent was unable to say when, if ever, he would again resume judicial functions in the Province; that the Administration of Justice Act, 1881, came into operation in British Columbia on the 28th June, 1881, but no rules of court had been published or made under said Act.

Section 28 of said Act provides as follows:—

"The judges of the Supreme Court shall have power to sit together in the city of Victoria, as a full court, and any three shall constitute a quorum, and such full court shall be held only once in each year, at such time as may be fixed by rules of court, and such court shall constitute a Supreme Court."

On the 8rd October, 1881, the application came before Mr. Justice Fournier, in chambers, who referred it to the full court.

Held, that the circumstances disclosed by the affidavit did not warrant the court in granting the application. Motion refused with \$20 costs.

Sewell v. B. C. Towing Co.—October 25, 1881.

Practice of Supreme Court—Continued.

8. *Appeal direct from court of original jurisdiction—S. C. A. Act, (1879), s. 6.*

Appeal allowed without any intermediate appeal to any court in the province of British Columbia. For the facts, *see Damages*, 25.

Bank of B. N. A. v. Walker.—June 22, 1882.

9. *Appeal direct from court of original jurisdiction—S. C. A. Act, (1879), s. 6.*

Leave to appeal direct to the Supreme Court of Canada without any intermediate appeal being first had to the Court of Appeal for Ontario, given by Gwynne, J., under s. 6 of the Supreme Court Amendment Act of 1879, on the ground that the Court of Appeal for Ontario would be bound by the case of *Cameron v. Kerr*, 3 Ont. App. R. 30, whereas the appellant sought to avoid the effect of that decision in this action.

Moffatt v. The Merchants' Bank of Canada.—xi. 46.

10. *Appeal direct from court of original jurisdiction—S. C. A. Act (1879), s. 6 [now s. 26, s-s. 3 of c. 135, Revised Statutes]—When court below has expressed an opinion on the merits—Church lands—Rector and wardens—Interest of latter to appeal in name of rector (plaintiff)—Indemnity.*

In a suit brought against D., as rector of St. James' cathedral, Toronto, to have certain lands declared to be held by him not only for himself as such rector, but also for the benefit of the other rectories in the city of Toronto, Ferguson, J., decided in favour of the plaintiff, a decision which on appeal to the Chancery Division of the H. C. J., was upheld. Up to the time of the judgment rendered by the latter court, the proceedings had been carried on in the name of D. by arrangement between him and the church-wardens of St. James cathedral who contended that they had an interest separate from that of D. in the disposition of the lands, and the revenues therefrom, and who had indemnified D. against costs. But upon the church-wardens proposing to appeal to the Court of Appeal, D. refused to allow his name to be further used in the proceedings. The Court of Appeal, upon an application being made by the church-wardens for leave to appeal, refused to grant such leave, holding that the church-wardens had no interest in the lands or revenues. The church-wardens thereupon appealed to Strong, J., in chambers, for leave to appeal *per saltum* to the Supreme Court of Canada under s. 6 of the S. C. A. Act (1879), from the judgment of the Chancery Division. The judge **Held**, that the church-wardens had an interest at least which justified them in appealing; he would not, however, as a judge in chambers over-rule the decision of the Court of Appeal, but grant leave to renew the application to the full court.

On the motion coming before the full court, it was **Held**, that the appeal should be allowed, upon a proper indemnity being given by the church-wardens to D. against all possible costs; the court expressing no opinion on

Practice of Supreme Court—Continued.

the merits of the case itself. Henry, J., dissenting, on the ground that it was impossible to decide the right to appeal without entering into the merits, and on the merits the church-wardens had no interest in the lands or revenues.

Langtry v. Dumoulin.—Nov. 16, 1885.—xiii, 258.

- 11 (a). Appeal direct from court of original jurisdiction—Special circumstances—S. & E. C. Act, R. S. C. c. 135, s. 26.

See APPEAL, 17.

12. *Direct from Divisional Court of Ontario—Special circumstances—Decision of Court of Appeal on abstract question of law, R. S. C. c. 135, s. 26.*

It is not a sufficient ground for allowing an appeal direct from the decision of the trial judge on further consideration or of a Divisional Court of the High Court of Justice of Ontario, that the Court of Appeal of that province had already, in a similar case before it, given a decision on the abstract question of law involved in the case in which the appeal was sought, though it might be sufficient if such decision had been given on the same state of facts and the same evidence,

Kyle v. The Canada Co. ; Hislop v. The Town of McGillivray.—xv. 188.

13. *Leave to appeal—Winding-up Act—Time extended after argument.*

After a case under the Winding-up Act was argued the appellant, with the consent of the respondent, obtained from a judge of the court below an order to extend the time for bringing the appeal, and subsequently before the time expired he got an order from the registrar of the Supreme Court, sitting as a judge in chambers, giving him leave to appeal in accordance with s. 76 of the Winding-up Act, and the order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal.

Ontario Bank v. Chaplin.—xx. 152.

14. *Case, adding formal judgment of the court below to.*

Hearing of appeal allowed to stand over till case perfected by the addition of the formal judgment of the court below.

Kearney v. Kean.—4th Feb. 1878.

15. *Case, adding formal rule of court below to.*

Appeal placed at foot of list for hearing to permit the rule of court below appealed from to be added ; counsel for respondent consenting.

Wallace v. Souther.—5th Feb. 1878.

16. *Case—Defective in not stating that judgment had been entered up on demurrers.*

See JURISDICTION, 21.

Practice of Supreme Court—Continued.**17. Case—Incomplete, not having formal order overruling demurrers—Order giving leave to add same.**

An original case, purporting to be in appeal from a judgment of the Supreme Court of British Columbia overruling the demurrers of the defendants to certain counts of the declaration, contained no formal order or judgment of the court overruling demurrers. Upon application of the agent for appellants' solicitors, the agent of the respondents' solicitors consenting, it was ordered that the Registrar be at liberty to file the case as received without the formal order, and that the appellants might attach within six weeks from that date the said formal order to the case and copies.

Per Ritchie, C.J., in chambers.

Bank of British North America v. Walker.—24th Dec. 1881.

18. Case, adding evidence of plaintiff to—Not properly part of—Chamber application.

Counsel for respondent (plaintiff) moves to have evidence given by respondent when examined as a witness on behalf of appellants (defendants) added to case. Counsel for appellants contend that under the code of C. P. the evidence cannot be considered, a declaration having been filed excluding it from the record.

Held, the application should have been made in Chambers, but in any event the evidence could not properly be made part of the case.

Etna Ins. Co. v. Brodie.—5th November, 1879.

19. Case—Amending—Remitting to court below.

The judge of the court below having certified that the examination of one D. was made part of the case *quantum valeat*, **Held**, that the case must be remitted to the court below to be settled in accordance with the statute and practice of the court. It should appear clearly, whether the examination did or did not properly form a part of the case.

McCall v. Wolff.—21st May, 1884.

20. Case—Defective—Undertaking by counsel to have decree of court of first instance added.

During hearing of appeal, the attention of appellant's counsel is called to the fact that the case is defective in not having in it the decree of the Court of Chancery. Argument allowed to proceed, on counsel undertaking to have decree added to case before judgment given.

Wright v. Huron.—3rd December, 1884.

21. Case—Extending time for printing and filing.

Under s. 79 of the S. & E. C. Act and Rules 42 & 70 S. C., a judge in chambers of the Supreme Court has power to extend the time for printing and filing case.

Per Ritchie, C.J., in chambers.

Bickford v. Lloyd.—5th March, 1880.

Per Fournier, J., in chambers.

Canada Southern Ry. Co. v. Norvell.—17th March, 1880.

Practice of Supreme Court—*Continued.*

[This practice has been followed in many cases and may be considered the established practice of the court. After the security is allowed any application to extend time for printing or filing case should be made to the Registrar of the Supreme Court in chambers, and not to the court below or a judge thereof.]

22. *Case—Application as to printing.*

No application should be made with respect to the contents of the "case," or to dispense with printing any part of it, until it has been settled by agreement between the parties, or by a judge of the court below, pursuant to the statute.

Per Gwynne, J., in chambers.

Carrier v. Bender.—11 March, 1886.

23. *Case—Printing—Substantial compliance with rules.*

Certain portions of the case had been italicized in the printing. The prothonotary certified that the printed case was the case agreed upon and settled by the parties. No affidavit was produced to contradict this certificate or to show that the italics had been improperly used.

Objection to case overruled.

The case is to be printed so as to procure a certain degree of uniformity and all that is required in a substantial compliance with rule 8.

Ritchie, C.J., in Chambers.

May v. McArthur.—3rd April, 1884.

24. *Case—Amendment of—Remitting to court below.*

Where it appeared that certain papers which a judge of the court below had directed should form part of the case had been incorrectly printed, especially the factum of the respondent in said court, which had been translated and in which interpolations had been made, the registrar was directed to remit the case to the court below to be corrected.

Fournier, J., in Chambers.

Parker v. Montreal City Pass. Ry. Co.—19th February, 1885.

25. *Case—Printing unnecessary matter in.*

Cost of printing unnecessary and useless matter in case not allowed on taxation.

L'Heureux v. Lamarche.—xii. at p. 465.

26. *Case.*

Should contain the reasons for judgment of courts below.

See per Ritchie, C.J., in Attorney-General v. City of Montreal.—xiii. at p. 359.

27. *Case in habeas corpus appeal.*

The first proceeding in appeal in a *habeas corpus* matter is the filing of the "case."

See JURISDICTION, 58.

Practice of Supreme Court—Continued.**28. Case—Document not proved at trial.**

A document not proved at the trial but relied on in the Court of Queen's Bench (P.Q.) for the first time cannot be relied on or made part of the case in appeal. *Montreal Loan & M. Co. v. Fauteux*, 3 Can. S. C. R. 433, and *Lyonnais v. Molsons Bank*, 10 Can. S. C. R. 527, followed.

The Exchange Bank of Canada v. Gilman.—xvii. 108.

29. Case—Amendment of—Too late to apply for after judgment.

When a new trial was ordered by the Supreme Court for misdirection in not submitting a question to the jury, the plaintiff applied to vary or reverse the judgment on affidavits shewing that the question had been submitted and answered.

Held, that the application was too late, as the court had to determine the appeal on the case transmitted, and the plaintiff had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended.

Providence Washington Ins. Co. v. Gerow.—xiv. 781.

And see INSURANCE, MARINE, 21.

30. Case—Amendment of—Action against Provincial Government—Style of cause.

In this case the action was instituted against the Government of the Province of Quebec, but when the case came up for hearing on the appeal to the Supreme Court the court ordered that the name of Her Majesty the Queen be substituted for that of the Province of Quebec.

Grant v. The Queen.—xx. 297.

And see CROWN, 28.

31. Certiorari—Application for.

Writ of *certiorari* moved for to bring up papers from the Supreme Court of British Columbia, the Chief Justice of that court having made an order staying execution on the judgment of the Supreme Court of Canada, certified to the court below in the usual way, on the ground that an appeal was being proceeded with to the Privy Council. Motion refused.

Sewell v. British Columbia Towing Co.—7th May, 1884.

32. Certiorari—In habeas corpus matter.

Neither the Supreme Court, nor a judge thereof, has power to issue a writ of *certiorari* in a *habeas corpus* matter.

See HABEAS CORPUS, 3.

33. Costs—Quashing appeal.

Where an appeal is quashed for want of jurisdiction, it will be quashed without costs, if the objection has been taken by the court itself.

See JURISDICTION, 26, 31, 36, 40, 56.

Practice of Supreme Court—Continued.

34. Nor will costs be given where the appeal has been inscribed for hearing *ex parte*, the respondent not appearing.

See JURISDICTION, 23.

35. But costs will be given if the objection has been taken by the respondent in his factum, or by motion at the earliest opportunity.

See JURISDICTION, 11, 21, 22, 43.

36. And in an appeal where the court may think it right to exercise its power of giving costs, even where the objection to the jurisdiction has been taken by the court itself, the respondent will be allowed the costs of the appeal.

See JURISDICTION, 33, 63.

37. *Costs—Where objection first taken in appeal.*

Where an appeal is disposed of on an objection taken for the first time at the hearing, no costs given.

See ARBITRATION AND AWARD, 5.
PRESCRIPTION, 12.

38. *Costs—When court equally divided.*

The judges of the Supreme Court being equally divided in opinion, and the decision of the court below affirmed, the successful party was refused the costs of the appeal. But (*per* Richards, C.J.), by 38th V. c. 11, s. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the judges.

The L. and L. and Globe In. Co. v. Wyld.—i. 605.

39. But the uniform practice of the court has been not to give costs when the court has been equally divided.

Curry v. Curry.—13th March, 1880.

McLeod v. N. B. Ry. Co.—v. 283.

Cote v. Morgan.—vii. 1.

McCallum v. Odette.—vii. 36.

Shield's v. Peak.—viii. 579.

Milloy v. Kerr.—viii. 474.

Megantic Election Case.—viii. 169.

Trust and Loan v. Lawrason.—x. 679.

And in every case of equal division to the present time (1893), this practice has been followed.

40. *Costs—Election appeal—Motion to amend judgment.*

Counsel for appellant moved to amend final order of Supreme Court as to costs, such order declaring that the respondent should pay the costs in the court below, but the trial judge having refused to tax to appellant the costs of

Practice of Supreme Court—Continued.

certain witnesses examined in cases not appealed to the Supreme Court. Held, that the judge was right. Motion refused with \$25 costs.

Soulanges Election Case.—28th March, 1885.

41. Costs—Not given in habeas corpus matters.

No costs are given in *habeas corpus* appeals, as a general rule, in *favorem libertatis*.

In re G. R. Johnson.—20th February, 1886.

42. But where an appeal in a *habeas corpus* matter had been proceeded with after the discharge of the prisoner and for the mere purpose of deciding the question of costs, the appeal was dismissed with costs.

See JURISDICTION, 24.

43. Costs—Counsel fee—Respondent arguing appeal in person.

Counsel for respondent moves for order to review taxation and to have counsel fee allowed to respondent, an advocate, who argued appeal in person. Refused, Fournier and Henry, JJ., dissenting.

Charlevoix Election Case (Yalin v. Langlois).—10th June, 1880.

44. Costs—Increased counsel fee—Quashing appeal.

An application for increased counsel fee is not one for the full court, but should be made to a judge in chambers.

When an appeal is quashed for want of jurisdiction, the court may order the taxation and payment of costs.

Beamish v. Kaulbach.—5th June, 1879.

45. Costs—Between solicitor and client.

Application for an order directing Registrar to tax costs between solicitor and client, refused. The Chief Justice states that the question was duly considered by the judges at the organization of the court, and it was not thought advisable to regulate costs between solicitor and client.

Boak v. Merchants Mar. Ins. Co.—3rd June, 1879.

46. Costs—Distraction of—Motion for.

Held, that, in appeal, where distraction of costs has not been asked for by the pleadings, or by the factum, it should be asked for when judgment is rendered. If not then asked for, any subsequent application must be made to the court upon notice to the other side.

See *Converse v. Clarke*, 12 L. C. R. 402; *The Water Works Co. of Three Rivers v. Dostaler*, 18 L. C. J. 196; *Lator v. Campbell*, 7 Legal News, 163.

Letourneau v. Dansereau.—27th May, 1886.

47. Costs—Construction of will.

Costs ordered to be paid by the respondents (executors and trustees of the will) out of the general residue of the estate of the deceased, but if the said

Practice of Supreme Court—Continued.

residue should have been distributed then the said costs should be contributed by the persons who should have received portions of the said residue ratably according to the amounts of the respective sums received by them.

Fisher v. Anderson.—iv. 406.

See WILL, 4.

48. Costs—Tender of.

Appellants, not having tendered with their plea costs accrued up to and inclusive of its production, ordered to pay to the respondent the costs incurred in the court of first instance.

The Etna Life Insurance Co. v. Brodie.—v. 1.

49. Costs of printing unnecessary and useless matter in case not allowed on taxation.

L'Heureux v. Lamarche.—xii. at p. 465.

50. Costs of Crown disallowed when referring to arbitration instead of relying on strict rights.

A claim against the Crown, for the value of work alleged to have been done in the construction of a bridge contracted for, such value not having been included in the final certificate of the engineer, having been referred to arbitration under 31 V. c. 12.

Held, that the certificate of the engineer was under the contract a condition precedent to recovery, but if the Crown had intended to rely on its strict rights it should not have referred the claim to arbitration, and it should, therefore, not be allowed the costs in any of the courts.

The Queen v. Starra.—xvii. 118.

And see CONTRACT, 85.

51. Counsel—Attorney-General of province—Jurisdiction of provincial legislature.

In an appeal between private suitors in which the validity of an Act of the Legislature of Ontario is questioned, the attorney-general of the province is heard in support of the jurisdiction of the provincial legislature.

Citizens Ins. Co. v. Johnston—April 9, 1886.

52. Counsel—Third counsel heard.

The court hears a third counsel for appellants, notwithstanding rule 32, as the laws of two provinces are in question, and there is a cross-appeal; the so doing not to be considered a precedent.

Coleman v. Miller.—Feb. 25, 1882.

53. Third counsel heard, intricate questions of law having to be argued, there being a cross-appeal, and counsel stating that the Court of Queen's Bench for Lower Canada had also relaxed its rule which forbids the hearing of more than two counsel on each side.

Practice of Supreme Court—Continued.

The court states that the fact of there being a cross-appeal is not of itself sufficient ground to cause the court to depart from its rule.

Jones v. Fraser.—March 9, 1886.

54. When one counsel from Quebec and one from Ontario had been heard for respondent, a third counsel (from Quebec) was heard on French authorities applicable.

Russell v. Lefrançois.—May 6, 1882.

55. *Counsel—Right to begin—In re case referred by O. C. respecting Supreme Court of British Columbia—"The Thrasher case."*

Held, that inasmuch as all statutes should *prima facie* be considered within the jurisdiction of the Legislature passing them, any one attacking a statute should begin. Therefore counsel for Dominion Government first heard.

—May 16, 1883.

See LEGISLATURE, 12.

56. *Counsel—Right to begin—Reply.*

Questions respecting validity of "The Liquor License Act, 1883." (See Liquor License Act, 1883).

Held, those attacking the validity of an Act should begin. Therefore counsel for the Provinces first heard. Only one counsel heard in reply for all the Provinces.

In re "Liquor License Act, 1883."—Sept. 23, 1884.

57. *Counsel—Right to begin.*

Question whether the Canada Temperance Act, 1878, s. 6, had been complied with, and whether proclamation should issue under s. 7. (See "Canada Temperance Act, 1878," 8).

The court directs the parties seeking to sustain the affirmative, and wishing to shew that the proclamation should issue, to begin.

In re "Canada Temperance Act, 1878," in the County of Perth.—28th Oct. 1884.

58. *Counsel—President of railway company, appellants, not entitled to be heard.*

The appellants do not appear by counsel at the hearing, but Mr. O'B. appears and states that he is the president and proprietor of the railway company, appellants, and wishes to be heard on their behalf. Refused. Appeal ordered to stand over till next session.

Halifax City Ry. Co. v. The Queen.—23rd May, 1884.

59. *Counsel—Foreign—Not heard.*

Counsel residing in the State of New York wishes to be heard on behalf of appellants in an appeal pending before the Supreme Court of Canada. Refused.

Halifax City Ry. Co. v. The Queen.—9th May, 1884.

Practice of Supreme Court—Continued.**60. Cross appeal—Application to hear although principal appeal not filed.**

Counsel for respondents, who have given notice of cross appeal, moves for leave to proceed with cross appeal, notwithstanding original case not filed until that day by appellants, and the appeal has not been inscribed.

Counsel for appellants also moves to have principal appeal heard, the delay in inscribing and in filing factums having been an oversight.

Held, that if the cross appellant desired to proceed with his cross-appeal he should have himself filed the original case. Both principal appeal and cross appeal to stand over.

Mayor, etc., of Montreal v. Hall.—17th Nov. 1883.

61. Cross appeal—Motion to quash appeal—Costs.

Motion made to quash appeal on the ground that it should not have been brought as a substantive appeal, but as a cross appeal in the case of *Pilon v. Brunet*.

Motion to quash dismissed, but the respondent in *Pilon v. Brunet* succeeding in getting the judgment of the court below reversed on one point and confirmed on another, was allowed costs as of a cross appeal taken under rule 61.

Brunet v. Pilon.—v. 318.

62. Cross-appeal—Damages.

Action for damages—\$1,000 awarded as solatium. Verdict set aside and not sustainable in appeal on ground of sufficient evidence of pecuniary loss to justify it, no cross-appeal having been taken.

See DAMAGES, 47.

63. Cross-appeal—Damages.

Action for damages by a tenant against landlord for negligence of employee in leaving elevator unattended. Verdict in Superior Court for \$5,000 reduced by Court of Appeal to \$3,000. No cross-appeal, and therefore judgment of Superior Court not restored.

See DAMAGES, 49.

64. Discontinuance of appeal in election case.

Upon respondent's counsel, in an election appeal, notifying the court that he had been served with notice of discontinuance, the court struck the appeal off the list.

The notice of discontinuance having been filed in the registrar's office, that officer certified to the Speaker of the House of Commons that by reason of such discontinuance the decision of the trial judges and their report had been left unaffected by the proceedings in the Supreme Court.

L'Assomption Election Case (Gauthier v. Brien).—xxi. 29.

Practice of Supreme Court—Continued.**65. Dismissing appeal.**

Where no one appears on behalf of the appellant when an appeal is called for hearing, and counsel for respondent asks for the dismissal of the appeal, it will be dismissed with costs.

Burnham v. Watson.—7th Dec. 1881; **Scott v. The Queen.**—27th March, 1886; **Western Ass. Co. v. Scanlan.**—27th March, 1886.

66. Dismissing appeal for want of prosecution—Undue delay in filing factum—Inscription.

The case was filed on the 22nd October, 1884, the respondent's factums on the 18th November, 1884. The last day for filing factums in appeals to be heard the following session was the 30th of January, 1885, and for inscribing, the 2nd February following. The appeal not being inscribed, the respondent's counsel gave notice of motion on the 9th February to dismiss appeal for want of prosecution. On the 14th the motion was heard. Appellant's agent stated that on the 2nd February he had made a search in the registrar's office for the respondent's factum, and had been informed it had not been filed. He was therefore under the impression the respondent could not take advantage of the delay of the appellant.

Held, that the undue delay in filing appellant's factum and inscribing appeal had not been satisfactorily accounted for, and the appeal should be dismissed.

Per Fournier, J., in chambers, 16th February, 1885.

An application was made to the court to rescind or vary the order of Fournier, J., and to allow the appellant to file his factum and inscribe appeal. Affidavits were filed, but merely to the effect: 1. That appellant's counsel thought that while the respondent was in default with regard to his factum, it could not be considered that there was any undue delay in the prosecution by appellant of his appeal; and 2. That the appeal was *bona fide* and serious.

Held, that the court would not interfere with the order of the judge in chambers.

Whitfield v. The Merchants Bank—4th March, 1885.

67. Dismissing appeal for want of prosecution—Order of judge in chambers—Motion to rescind order.

A party seeking an appeal obtained an extension of time for filing his case but failed to take advantage of the indulgence so granted, whereupon, on the application of the respondent, the appeal was dismissed by the judge in chambers. On motion to rescind the order dismissing the appeal.

Held, Strong and Gwynne, JJ., dissenting, that under the circumstances of the case the court would not interfere by rescinding the judge's order and restoring the appeal.

City of Winnipeg v. Wright.—xiii. 441.

Practice of Supreme Court—Continued.**68. *Dismissing appeal for want of prosecution.***

Counsel for respondent moves to dismiss appeal for want of prosecution. Refused, but appellant directed to have appeal brought on for hearing next session, otherwise to stand dismissed; appellant to pay costs of the application.

Cote v. Stadacona Ass. Co.—10th March, 1881.

69. *Dismissing appeal.*

Motion to dismiss appeal referred by court to Chief Justice in chambers.

Martin v. Roy.—28th January, 1879.

70. *Dismissing appeal in controverted election case—Discontinuance filed.*

Counsel for appellant moves to dismiss appeal, not wishing to proceed with it, and having filed a discontinuance.

Counsel for respondent consents, on payment of costs. Appeal dismissed with costs.

Soulanges Election Case, Filiatrault v. De Beaujeu.—27th November, 1883.

71. *Dismissing appeal—Controverted election case—Order obtained in chambers by consent—Application to full court.*

Counsel for respondent moves for an order dismissing appeal in a controverted election case. An order had been obtained in chambers, on consent, but doubts had been raised as to whether the order should not have been an order of the court. Granted.

North York Election Case, Patterson v. Mulock.—12th May, 1883.

72. *Dismissing appeal—Controverted election case—Application to judge in chambers.*

An application to dismiss an election appeal for want of prosecution should be made to a judge in chambers.

Halton Election Case, Lush v. Waldie.—xix. 557.

Chicoutimi v. Sanguenay Election Case.—May 16th, 1892.

And see ELECTION, 34.

[Therefore, according to the practice as now established (1893) all applications to dismiss for want of prosecution, should be made to the registrar in chambers].

73. *Factum.*

Irrelevant matter in factum, reflecting on the conduct of one of the judges of the court below, ordered to be struck out.

Wallace v. Souther.—5th February, 1878.

Practice of Supreme Court—Continued.**74. Factum—Scandalous and impertinent.**

The plaintiff's factum containing reflections on the conduct of the judges of the court below, was ordered to be taken off the files as scandalous and impertinent.

Vernon v. Oliver.—xi. 156.

75. Factum—Point not raised by—Postponement of hearing.

A point is raised at the hearing not in factum, and counsel for respondent therefore objects that he is not prepared to argue it. The court adjourns hearing for a week.

Western Counties Ry. Co. v. Windsor & Annapolis Ry. Co.—6th Feb., 1879.

76. Factum, further time required to file—Motion to dismiss appeal—Costs.

Motion to dismiss appeal refused, but appellant requiring further indulgence to file factum ordered to pay costs of motion.

Dawson v. McDonald.—13th December, 1879.

77. Factum—Default in filing—Inscription, motion for.

Motion for leave to inscribe case which had not been put on inscription list because factum of appellant not filed in time. The appellant had been directed to bring appeal on for hearing at the session then being held, otherwise appeal to stand dismissed. Counsel stated that delay in filing factum had occurred because both parties had consented to delay being accorded for so doing. Counsel for respondent consented.

Held, that the rule requiring factums to be deposited within a limited time had been passed for the convenience of the court and judges and could not be waived by consent of parties, but under the peculiar circumstances, and in view of the consequences of refusing the motion, liberty to inscribe might be given.

Cote v. Stadacona Assurance Company.—4th May, 1881.

78. Factum—Motion to strike out unnecessary matter from.

Objections to a factum as containing unnecessary matter may be urged at the hearing.

Coleman v. Miller.—23rd February, 1882.

79. Factum—Leave to deposit—Inscription ex parte.

When appeal inscribed for hearing *ex parte* is called, counsel for respondents asks leave to be heard and to be allowed to deposit factum. Counsel for appellant consents. Granted.

Parker v. Montreal City Passenger Ry. Co.—9th March, 1885.

80. Factum—Leave to deposit—Inscription ex parte.

When appeal inscribed for hearing *ex parte* is called, counsel for respondent asks leave to be heard, although his factum had not been deposited within the time provided by the Rules. Counsel for appellant consents.

Practice of Supreme Court—Continued.

Held, that the rules respecting *factums* must be strictly complied with, and the Registrar should not receive *factums* tendered after the delay specified in the Rule. Counsel for respondent allowed to be heard, but the case not to be considered a precedent.

Lord v. Davidson.—3rd November, 1885.

81. Factum—Submitting appeal on.

Counsel states he has consent of solicitors on both sides to submit appeal on *factums* and reporters' notes of a former argument before the court. Allowed.

Lawless v. Sullivan.—22nd January, 1879.

82. Factums—Submitting appeal on.

Court refuses to allow appeal to be submitted on the *factums*, but decides it must be orally argued.

Charlevoix Election Case Yalin v. Langlois.—7th June, 1879.

83. Factum—Submitting appeal on.

Where a re-hearing became necessary owing to a change in the *personnel* of the court, the judge who had not heard the appeal consenting, and counsel for all parties desiring it, the court assented to the appeal being submitted on the *factums*.

McKenzie v. Kittridge.—18th June, 1879.

84. Factums—Submitting appeal on.

On application of counsel for appellants, counsel for respondent assenting, the court consent to have appeal submitted on *factums* without oral argument.

Muirhead v. Sheriff.—2nd June, 1886.

85. Fees—In criminal appeals—None payable to Registrar.

No fees are payable to the Registrar in criminal appeals, the tariff of fees in schedule X not being intended to be applied to such appeals.

Ruling by Richards, C.J.

[This has been the established practice of the court since its organization].

86. In a habeas corpus case the first proceeding in appeal is the filing of the case with the Registrar—This must be done within 60 days after the pronouncing of judgment appealed from.

See JURISDICTION, 58.

87. Hearing, notice of—Affidavit of service.

When appeal heard *ex parte*, the court requires an affidavit proving service of notice of hearing.

Kearney v. Kean.—31st January, 1879.

Domville v. Cameron.—80th October, 1879.

Practice of Supreme Court—Continued.

88. Hearing—Setting down Exchequer Appeal—Exchequer Court Rules 138, 231, 263—Supreme Court Rule 44—S. 68, S. & E. C. Act, 1875.

Application for a direction to the Registrar to set down for hearing an appeal from a judgment of the Exchequer Court on a Petition of Right pronounced at Quebec on the 17th October, 1877, by J. T. Taschereau, J. The contract on which the petition was brought was signed at Quebec, the work was done on a section of the I. C. R. in the Province of New Brunswick. On the 9th November, 1877, the deposit of \$50 required by s. 68 of the S. & E. C. Act, 1875, as security for costs, was made with the Registrar.

Rule 231 Exchequer Court, since repealed by rule 265, provided that no decision or ruling at the trial or hearing of a cause should be appealed from directly to the Supreme Court, but the party dissatisfied should first seek relief by moving before the Exchequer Court "as hereinbefore provided," and the appeal should be from the refusal to grant an order *nisi*, or if an order should have been granted, from the decision of the court on the motion to make the same absolute.

Rule 138 E. C. deals with applications for new trial and provides that "a party desirous of obtaining a new trial . . . must apply to the court by motion for an order calling on the opposite party to show cause, at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within ten days after the trial, or within such extended time as the court or a judge may allow."

By rule 261 Exchequer Court rule 231 of the Exchequer Court had been made applicable to cases in which the cause of action had arisen in the Province of Quebec. But rule 138 had not been expressly declared applicable to such cases.

On the 12th February, 1878, rules 138 to 142, both inclusive, were ordered and declared to be and to have been applicable to actions in which the cause of action shall have arisen in the Province of Quebec.

On the 7th January, 1878, an application for a rule *nisi* to set aside the judgment was made to Taschereau, J. On the 7th February, 1878, he pronounced judgment refusing it. Subsequently proceedings were taken in the Exchequer Court relating to a change of attorney by the suppliant and the taxation of costs between the suppliant's solicitor and his clients, and an order was obtained from a judge of the Exchequer Court directing all the papers to be transmitted to the acting registrar at Quebec for the purposes of that taxation. The registrar did not set the appeal down for hearing, and no steps were taken relating to the appeal, nor were any proceedings taken to have the judgment entered, nor had the registrar been applied to to set the appeal down for hearing until shortly before the date of the application, the 22nd February, 1883.

Held, that no *ex post facto* effect ought to be given to order 263, which was not intended to apply so as to affect retroactively proceedings had in pending causes, and that the registrar not having set the appeal down for hearing as

Practice of Supreme Court—Continued.

required by s. 68, and not having entered the judgment, the appeal was not out of court by the operation of rule 44 Supreme Court, which provides that unless an appeal shall be brought on for hearing within one year after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the court or a judge shall otherwise order.

Motion granted, (Ritchie, C.J., dissenting), but without costs, the point of practice involved being a new one.

Berlinquet v. The Queen.—1st May, 1883.—xiii. 26.

89. Hearing—Election case—Expediting proceedings in—S. 14, S. & E. C. Act.

When an election appeal is properly in court and in a position to be set down by the registrar, an application can be made to the Chief Justice (under s. 14, S. & E. C. Act) to expedite the proceedings.

Bothwell Election Case, Smith v. Hawkins.—22nd January, 1884.

90. Hearing *ex parte*—Factum not filed—Appellant irregularly before court.

When appeal called, counsel for appellants appears. No one appears on behalf of respondent.

The appellant's factum not having been filed till the morning the appeal is called on for hearing, instead of three clear days before the first day of the session, as required by rule 54, the court refuses to hear him *ex parte* while thus irregularly before the court.

Levis Election Case, Belleau v. Dussault.—30th October, 1884.

91. Hearing, postponement of—Illness of counsel.

Motion to postpone hearing till the following session on the ground of unexpected illness of counsel retained. Granted.

Adamson v. Adamson.—5th December, 1884.

92. Hearing—Motion to strike appeal off list—Notice.

A motion to strike an appeal off the list of appeals inscribed for hearing must be on notice.

Parker v. Montreal City Passenger Ry. Co.—7th March, 1885.

93. Hearing—Factums not filed.

Motion to have appeal heard at the then present session, notwithstanding case and factum of appellant not filed 30 days before first day of session, and factum not yet filed on behalf of the Crown. Counsel for Crown consenting. Refused.

O'Brien v. The Queen.—10th June, 1878.

Practice of Supreme Court—Continued.**94. Hearing—*In habeas corpus appeal.***

An application to be allowed to bring a *habeas corpus* appeal on for hearing after short notice, must not be *ex parte*.

See HABEAS CORPUS, 2.

95. Hearing—*Motion to re-open.*

In this case, the Supreme Court had refused by their judgment to give a writ of prohibition to prevent the taxation of respondent's costs by the county judge, such taxation having been made before the judgment of the Supreme Court was given; but the court stated that the respondent was not entitled to costs. (*See Costs* 3.)

Counsel for appellants moved to re-open argument of that part of the appeal as to the right to the prohibition, and for a reconsideration thereof, on the ground that the amount taxed to respondent had been paid into the County Court, and that the county judge might make an order directing the money so paid into his court to be paid out to respondent unless prohibited.

Held, that the application which was really for a rehearing of the appeal, which had been duly considered and adjudicated upon by the court, could not be entertained; that the court could not assume that the County Court judge would act illegally, and in defiance of the judgment of the court, to the effect that the respondent was not entitled to costs; but that if the County Court judge should propose so to act, the appellants would have their remedy against him, and might apply to one of the superior courts for a writ of prohibition.

Counsel for appellants not called upon.

Motion refused with \$25 costs.

Ontario and Quebec Ry. Co. v. Philbrick.—May 18th, 1886.

96. Inscription—*Case filed after time for.*

Counsel for appellant moves for leave to inscribe appeal for hearing, though case filed after time for inscribing, all parties being desirous of having appeal heard and consenting. Motion refused.

Grip Printing and Publishing Company v. Butterfield.—20th Nov. 1884.

97. Inscription—*Appeal perfected after day for—Consent by counsel.*

In an appeal perfected after day for inscribing, an application is made by counsel for appellant, counsel for respondent consenting, to have appeal heard at the session of the court then proceeding.

Held, that the appeal must come on in the regular way the following session, there being no circumstances shown to induce the court to interfere to expedite the hearing.

Bank of Toronto v. Les Cure, &c. La Ste. Yierge.—27th February, 1885.

Practice of Supreme Court—Continued.**98. Interest—Application for.**

An application to vary judgment by inserting direction that interest be allowed for the period during which the appeal has been pending, must be on notice.

Trust and Loan v. Ruttan.—5th February, 1878.

99. Motion, to be allowed interest.

Counsel for appellant moves for interest for time judgment has been stayed, pursuant to s. 36, S. & E. C. Act. Question referred to full court by Fournier, J.

Held, a question the court should dispose of on its own motion.

McQueen v. The Phoenix Mutual Fire Insurance Co.—9th April, 1880.

100. Interest—Motion to be allowed—On allowance of appeal.

Motion for allowance of interest on verdict from date thereof in appeal from N. B.

Held, that it be allowed on principal sum from last day of next term after verdict.

Clark v. Scottish Imperial Insurance Company.—19th February, 1880.

101. Judgment—Application to stay execution of—Requête civile.

The judgment of the Supreme Court must, under section 46, S. & E. C. Act, be entered and sent to the court below before defendant can have recourse to a proceeding by *requête civile*. A *requête civile* does not stay execution as a matter of course. The defendant would have to apply to a judge of the Superior Court or a judge thereof for an order. A judge in chambers should not grant an order staying execution of a judgment, especially when defendant has had ample time to apply to the full court. *Per Taschereau, J.*

See OPPOSITION, 2 (a).

102. Judgment—Nunc pro tunc.

The respondent, the assignee of an insolvent estate, having died between the day of hearing of the appeal and the day of rendering judgment, on motion of counsel for appellant the court orders the order in appeal to be entered *nunc pro tunc* as of the date of hearing.

Merchants Bank v. Smith.—23rd May, 1884.

103. Judgment—Nunc pro tunc.

On motion of appellant's counsel, judgment is directed to be entered *nunc pro tunc* as of the day of argument, one of the parties having died in the interval.

Merchants Bank of Canada v. Keefer.—12th January, 1885.

104. Judgment, nunc pro tunc.

On motion of counsel for respondent, supported by affidavit showing that respondent had died between the date of hearing and the date upon which

Practice of Supreme Court—Continued.

judgment delivered, the court directs judgment to be entered *nunc pro tunc* as of the day of hearing.

Ontario and Quebec Ry. Co. v. Philbrick.—26th May, 1886.

105. Judgment, *nunc pro tunc*.

Where the judgment of the court was amended to conform to the intention of the court, the order amending declared that the judgment should read *nunc pro tunc*.

See PRACTICE OF SUPREME COURT, 109.

106. Judgment—Motion for leave to address court with reference to questions disposed of by—Reference to Judge in Chambers.

Counsel for respondent moves for leave to address court on question of appointment of valuers and question of costs, disposed of by final judgment of court. Referred to Taschereau, J., in Chambers, who stating to the court that the respondent seeks to practically reverse the judgment of the court, the motion is dismissed with costs.

Reeves v. Gerriken.—10th April, 1880.

107. Judgment—Application to vary.

Motion to vary minutes, referred to Strong, J., in Chambers, to be subsequently heard *pro forma* before the court.

Bickford v. Grand Junction.—8th June, 1878.

108. Judgment—Application to amend—"Next friend"—Costs.

The judgment of the Supreme Court, as settled and entered, having directed that the costs should be paid by the appellant to the respondent on application of respondent, the order was amended by directing that the costs should be paid by the appellant's "next friend" to the respondent, the appellant having sued and prosecuted the appeal by his next friend.

Ritchie, C.J., in Chambers.

Penrose v. Knight.—25th June, 1879.

109. Judgment—Amending—Form of, in patent suit.

In a suit for the infringement of a patent (See Patent of Invention, 1) the final judgment in appeal was sent to the registrar of the Chancery Division of the High Court of Justice for Ontario pursuant to section 46, S. & E. C. Act. The order directed a reference to the master. Upon proceeding to take the accounts the master ruled that, "having regard to the allegations in the said plaintiff's bill of complaint, and the provisions of section 28 of the Patent Act, the measure of damages and account of profits to which the said plaintiffs are entitled as against the defendant, under the said judgment should be based upon the reasonable price per machine heretofore charged by the said plaintiffs as and for a royalty, and the average profit per machine heretofore made by the said plaintiffs on sales of their patented invention, subject, however, to any

Practice of Supreme Court—Continued.

right the said plaintiffs may have (1) to negative their said pleading, and (2) to show by evidence or otherwise that my said ruling as to the measure of damages and account of profits is not applicable to the case of their patented machine."

This ruling was appealed from to Proudfoot, J., who sustained the appeal, on the ground that the order directed a reference as to profits as well as damages, including damages by the use of infringing machines by persons who had bought them from defendants, and that the order being clear the pleadings could not be looked at to assist in construing it.

The defendants thereupon appealed to the Divisional Court, and also made an application to the Supreme Court, for an amendment to the judgment of that court, to make it conform to the judgments pronounced.

Held, that the judgment should be amended, and the inquiry as to damages limited to an "inquiry whether any, and what damages have been sustained or incurred by the plaintiff, and to what amount by reason of the defendants infringement of the said patent."

The order settled by the registrar on the application was as follows:—

"In the Supreme Court of Canada."

[Judges present.]

[Date.]

[Style of cause.]

"Upon the petition of the above named respondents, John Goldie and Hugh McCulloch presented unto this court this day, in presence of counsel for the above named plaintiffs (the appellants in this court) upon hearing read the petition and the affidavits filed in support of and in opposition thereto, and upon hearing what was alleged by counsel for all parties, this court, for the purpose of removing doubts which it is alleged have arisen as to the construction of the order of this court, dated the 19th day of June, A.D., 1883, made in the said cause, doth order that the said order of the 19th day of June, A.D., 1883, be and the same is hereby varied and amended to read *nunc pro tunc*, as follows, namely:—

"In the Supreme Court of Canada."

[Judges present.]

[Date.]

[Style of cause.]

"The appeal of the above named appellants (plaintiffs) from the order of the Court of Appeal for Ontario, made in this cause on the 30th day of June, 1882, and dismissing the appeal of the said appellants from the decree of the Court of Chancery made on the 23rd day of June, 1880, coming on to be heard before this court on the 28th, 29th and 30th days of November last, in the presence of counsel as well for the appellants as for the respondents, whereupon and upon hearing what was alleged by counsel aforesaid, this court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this court did declare, order and adjudge that the said appeal should be and the same was allowed.

"And this court did further declare, order and adjudge, that the appellant (plaintiff) George Thomas Smith, was the first and true inventor of the

Practice of Supreme Court—Continued.

invention described and claimed in the letters patent No. 2257, mentioned in the first paragraph of the appellant's (plaintiff's) re-amended bill of complaint; that the said letters patent are good, valid and in full force and effect, and that the appellant (plaintiff) George Thomas Smith has been from the date thereof and still is entitled thereunder to the exclusive right, privilege and liberty of making, constructing and using, and vending to others to be used, the invention in the first paragraph of the said plaintiff's re-amended bill of complaint, described as follows:—

“ ‘ In combination with the bolting surface of a flour bolt, through which a current of air is made to pass by means of an air chamber and a fan, or its equivalent, a brush or series of brushes arranged to traverse the under surface of said bolt substantially for the purpose set forth in the said letters patent and the specifications thereto, of cleaning the belt of particles of flour adhering thereto, subject to such right as his co-plaintiffs now have under the assignments and licenses in the said bill of complaint set forth; that the patents 1789 and 1793 in the respondents' (defendants') answer mentioned were never valid and form no defence to the appellant's (plaintiff's) said patent, and that the machines constructed by the respondents (defendants) in the pleadings mentioned are infringements of the said letters patent of the said George Thomas Smith, and that the appellants (plaintiffs) are entitled to an injunction restraining the said respondents (defendants) and each of them and their and each of their servants, workmen and agents, during the continuance of the said letters patent, or any extension of them, from making, constructing, using, or vending to others to be used, any machine containing the same combination as the said machines in the pleadings mentioned, or only colourably differing therefrom, or any other machine constructed according to or involving the appellants' (plaintiffs) said patented invention, or only colourably differing therefrom, or being an infringement of the appellants' (plaintiffs) said patent, or causing or procuring the same to be infringed.

“ And that the appellants (plaintiffs) are entitled to have respondents (defendants) discover upon oath all the machines in their possession or made, used or sold by or for them, or either of them, containing the combination hereinbefore set forth, and of the names of the purchasers thereof, and that the appellants (plaintiffs) are entitled to an inquiry whether any and what damages have been sustained by the appellants (plaintiffs) and to what amount, by reason of the respondents' (defendants) infringement of said patent, such damages to be limited to six years previous to the date of the filing of the bill of complaint, and that the appellants (plaintiffs) are entitled to be paid by the defendants such sum of money as upon such inquiry shall be found fit to be awarded to the appellants (plaintiffs) for such damages as aforesaid, within one month after the filing of the master's report; and the said appellants (plaintiffs) are entitled to be paid the costs of this suit including costs incurred by them in the Court of Chancery or Chancery Division of the High Court of Justice for Ontario, and also in this court, forthwith after taxation thereof, and for the purposes aforesaid this cause is referred back to the Chancery Division of the High Court of Justice for Ontario, to make such orders and directions as may be necessary; and this court did further order that the

Practice of Supreme Court—Continued.

registrar of this court do deliver up to the appellants and respondents the exhibits filed or deposited herein by them respectively.

Smith v. Goldie.—9th December, 1885.

110. *Judgment—Amending—Power of court over its own judgments.*

Motion to amend the final judgment in appeal. The court when delivering judgment stated that a sum of \$2,599 should be awarded to plaintiff. The order in appeal providing for the payment of that sum was settled and sent to the court below. Counsel for appellant contended that it clearly appeared there had been an error in the calculation, and that in arriving at the sum awarded certain sums had been twice deducted, depriving the plaintiff of a sum of \$8,218.98. Counsel for respondent contended that it did not appear upon the face of the reasons for judgment that an error had been made, and therefore the application was in the nature of a re-hearing. Under the practice of the Privy Council this could not be allowed.

Held, that it being clear that by oversight or mistake an error had occurred, the court had power of its own motion to amend its judgment to make it conform to the intention of the court and the principles upon which its judgment was based. Order to be made directing the Registrar to call upon the proper officer of the court below to have the judgment of the court returned to be amended. *See Montreal Ass. Co. v. McGillivray*, 11 L. C. R. 825.

Rattray v. Young.—18th March, 1886.

111. A judgment of Privy Council reversing judgment of Supreme Court, should be made a rule of the Supreme Court—The order of Supreme Court directs repayment of costs received pursuant to a judgment so reversed.

See APPEAL, 17.

112. *Judgment—Appeal from settlement of minutes of.*

In this case (*see Banks and Banking, 12*) the respondent appealed to a judge in chambers from the settlement of the minutes of the judgment, on the ground of material error as to the amount ordered to be paid to the appellant (\$8,655.18), which amount he contended ought to be only \$3,200.60, according to the judgment of the court, and also on the ground that the appellant should be condemned to pay the costs of his own appeal before the Court of Queen's Bench.

Held, that the application should be dismissed.

Per Fournier, J.—The respondents by their motion of the 6th of April last appealed from the settling of the minutes of the judgment pronounced by this court on the 8th March, 1886, on the ground that there was an error in the figures of the draft minutes settled by the Registrar, which brought the amount of the judgment in question up to \$8,655.18, whereas it ought only to have been \$3,200.60, alleging that the difference between the said two sums, namely, \$5,455.58, is not put in question by the pleadings of the parties, and that in

Practice of Supreme Court—Continued.

consequence that part of the judgment is null, because it goes further than the demand (*ultra petita*).

This reason is without foundation, because the said sum of \$5,455.53, paid by the fault and negligence of Louis Molleur, jr., to the assignee Anger, as dividends on contested claims by Lamoureux, formed part of the \$25,251.55 advanced by Molleur and the Bank of St. John to Lamoureux by the deed of 16th May, 1876. And the said sum is put in question by the last part of the conclusions of the action formally demanding an account of sums received by virtue of the deed of the 16th May, 1876, in the terms, "and of the money by him paid or received for him or on his account since the execution of the deed (16th May, 1876) in discharge of the advances made or promised by the defendant as representing the said party impleaded (the bank)."

But the said sum not only formed part of the matter in dispute in this case, but was also the object of a special provision in favour of the respondents in the judgment of the Superior Court sitting at St. John's, P.Q., dated 29th January, 1888, declaring that no sum should be deducted from that of \$25,251.55 mentioned in the deed of assignment (16th May, 1876), as representing the amount of any contested claim, although the defendant Molleur for the said bank, paid to the assignee the whole of the said sum of \$25,251.55. This court by its judgment overruled that part of the judgment of the said Superior Court, and has adjudged and decided on the contrary, that the said sum as representing the amount of contested claims ought to be deducted from the \$25,251.55 for the reasons specified in its judgment. Consequently I hold that there is no error in the amount of the judgment, and that the draft minutes settled by the Registrar is in accordance with the judgment pronounced by the court. Motion dismissed with costs fixed at \$20.

Lamoureux v. Molleur.—May 31, 1886.

113. Where new trial ordered for misdirection in not submitting question to jury, an application to vary or reverse the judgment on affidavits showing that question was submitted and answered, held too late.

See INSURANCE, MARINE, 21.

114. *Court equally divided—Effect of.*

When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the actual parties to the litigation only and the court, when a similar case is brought before it, is not bound by the result of the previous case.

Stanstead Election Case (Rider v. Snow).—xx. 12.

115. Judgment—Consent to reversal of, in election appeal—Election appeal allowed and petition dismissed upon consent being filed and an affidavit as to facts stated in such consent, R. S. C. c. 135, s. 52.

See ELECTION, 47.

Practice of Supreme Court—Continued.**116. Matter in dispute—Affidavit as to value of.**

Upon counsel undertaking to file an affidavit showing matter in dispute to be over \$2,000, the hearing of the appeal is proceeded with.

McCorkill v. Knight.—31st January, 1879.

117. Matter in dispute—Affidavit as to value of—Bank shares—Actual value.

Where the matter in controversy is bank shares, their actual value at the time of the institution of the action and not their par value will determine the right of appeal under s. 29, Supreme and Exchequer Courts Act, and the actual value of such shares may be shown by affidavit.

Muir v. Carter; Holmes v. Carter.—xvi. 473.

118. Notice of appeal under rule 269 of the Maritime Court of Ontario—Rules of Maritime Court—Entry of judgment—Time for appealing.

See APPEAL, 27.

119. Notice of appeal under s. 41, S. & E. C. Act—Extension of time for giving—Application after time expired.

The Supreme Court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the judge has not ruled according to law," unless the notice required by 41 of the S. & E. C. Act, R. S. C. c. 135, has been given.

The time for giving notice under s. 41 can be extended as well after as before the 20 days have elapsed.

Vaughan v. Richardson.—xvii. 703.

120. Parties—Application to add a party as co-respondent—Rule 36, S. C.—Art. 154, C. C. P.—Rule 38, S. C.

Motion under rule 36 of S. C. to add E. B. as a co-respondent, on the ground that he had obtained a notarial assignment from the respondents of all their interest in the suit. The suit had been instituted by the plaintiff *in forma pauperis*, and judgment given by the Superior Court condemning the defendants (appellants) to pay \$1,200. This judgment had been affirmed by the Court of Queen's Bench. The alleged assignment had been made after the judgment rendered by the Superior Court and before the appeal to the Queen's Bench, but no application had been made to the latter court to make E. B. a party.

The contention on behalf of appellants was that under Art. 154, C. C. P. an intervention could be had or forced at any time before final judgment; and if any question as to liability of the person sought to be added should arise, the court could remit the case under rule 38, S. C. to the Superior Court to have such question decided.

Practice of Supreme Court—Continued.

It was admitted that the object of the application was to have a party who would be answerable for the costs of the appeal.

Held, that the application should have been made at the earliest opportunity to the Court of Queen's Bench, the assignment to E. B. having been made before the appeal to that court. The question as to the liability of E. B. to be forced into the cause as a party was not one which, under the circumstances, the Supreme Court should be called upon to decide. The appeal should be heard on the case as settled in and transmitted by the court below. (Henry, J., dissenting.) Motion dismissed with costs fixed at \$25.

Dorion v. Growley.—19th March, 1886.

121. Parties—Objection for want of.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to an action on a policy of life insurance.

Yenner v. Sun Life Ins. Co.—xvii. 394.

122. Privy Council, application for leave to appeal to.

The court has no jurisdiction either to refuse or grant an application for leave to appeal to the Privy Council

Kelly v. Sullivan.—21st January, 1877.

Moore v. Connecticut Mutual Ins. Co.—9th April, 1880.

Queen Ins. Co. v. Parsons.—21st June, 1880.

Notice of intention to make such an application should not be put on the motion paper.

Nasmith v. Manning.—4th March, 1881.

123. Privy Council—Judgment of.

A judgment of the Privy Council reversing the judgment of the Supreme Court should be made a rule of the Supreme Court.

The application should be made in Chambers.

See APPEAL, 17.

124. Quashing appeal.

Motion to quash an election appeal directed to stand over till hearing of the appeal, as too important to be disposed of on summary application.

Charlevoix Election Case.—18th February, 1879.

[Under the statute, all motions to quash for want of jurisdiction must be made to the court and not in Chambers.]

125. Security—No power to dispense with—Appeal in form *pauperis*—Petition for—Allowance of appeal—Ss. 24 & 79 S. C. Act.

The Supreme Court, or a judge thereof, has no power to allow an appeal in *form pauperis*, or to dispense with the giving of the security required by the statute. Approving of the security is a mode of allowing the appeal.

Practice of Supreme Court—Continued.

Section 24 of the S. & E. C. Act does not give the court power to allow appeals, because Her Majesty may be recommended to allow appeals by the Judicial Committee of the Privy Council, nor is it in the power of the judges of the court to make rules or orders for the allowance of appeals. Nor does s. 79 of the S. & E. C. Act, give the court or a judge any power to grant or to make rules for granting the prayer of a petition to be allowed to have or prosecute an appeal in *forma pauperis*.

Fournier, J., in chambers. *Fraser v. Abbott*.—22nd February, 1878.

Richards, C.J., in chambers. " 16th March, 1878.

**126. Security for costs—Application for, when to be made—
Petition of right.**

Where, by a letter addressed to the suppliant, the Secretary of the Public Works Department stated, that he was desired by the Minister of Public Works to offer the sum of \$8,950 in full settlement of the suppliant's claim against the department, an application on behalf of the Crown for security for costs was refused, on the ground that the power of ordering a party to give security for costs, being a matter of discretion and not of absolute right, the Crown in this case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. Application for security for costs in the Exchequer Court must be made within the time allowed for filing statement in defence, except under special circumstances. By Richards, C.J., in the Exchequer Court of Canada.

Wood v. The Queen.—vii. 681.

**127. Security for costs of appeal—Supreme and Exchequer Court
Act, s. 31—Supreme Court Rule 6—Court of Review (P.Q.),
no appeal direct from.**

The following certificate was filed with the printed case, as complying with Rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section (31) thirty-first of the Supreme Court Act, passed in the thirty-eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878. Signed, Hubert, Honey & Gendron, P. S. C." Held, on motion to quash appeal, that the deposit of the sum of \$500, in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of the appeal.

Per Taschereau, J.—The case should be sent back to the court below in order that a proper certificate might be obtained.

Per Strong and Taschereau, JJ.—That an appeal does not lie from the Court of Review (P. Q.) to the Supreme Court of Canada. *Henry, J., contra.*

Practice of Supreme Court—*Continued.*

The appeal was quashed with costs, which included the general costs of respondent up to time motion made. The full fee of \$25 was taxed by the registrar on hearing of motion. This was increased by fiat of Fournier, J., to \$100.

Macdonald v. Abbott.—iii. 278.

[Appeals can now come from the Court of Review in certain cases. *See* 54 & 55 V. c. 25.]

128. *Security, allowance of—Orders made by court below after.*

Orders made in a cause by the court below after the allowance of the appeal and giving of the security disregarded by the Supreme Court.

Lakin v. Nuttall.—iii. 685.

129. *Security—Allowance of—Judge of court below functus officio.*

When a judge of the court below has made an order allowing the security, he is *functus officio*, and the appeal is then subject to the jurisdiction of the Supreme Court. No application can be made to the judge or the full court below to rescind the order. Any application must be thereafter made to the Supreme Court or a judge thereof.

Walmaley v. Griffiths.—7th December, 1885.

130. *Security—Allowance of—A stay of proceedings in court below—Costs.*

The Supreme Court allowed an appeal from a judgment of the Court of Appeal directing a reference which had been partly proceeded with after the allowance of the security.

The solicitor for the appellant desired the Registrar to insert a provision in the order in appeal of the Supreme Court specially "including the costs of and attending the reference." The Registrar referred the point to the Chief Justice in chambers and his lordship stated his opinion to be that the Supreme Court could not recognize any proceedings taken in the court below after the allowance of the security, which acted as a stay of all proceedings, except of execution in cases provided for by s. 82 of the S. & E. C. Act. If proceedings had been taken in the court below which should not have been taken, application should be made to that court with reference to such proceedings. The order of the Supreme Court should provide generally for the payment of all costs incurred by the appellant. *See* Partnership, 6.

Starrs v. Cosgrave Brewing & Malting Co.—17th April, 1886.

131. *Security for costs of appeal allowed to be given by Judge of S. Ct. under s. 31, S. & E. C. Act. as amended by s. 14 S. C. A. Act, 1879—Vacation.*

The following facts appeared by affidavit:—On the 27th June, 1881, judgment was rendered by the Supreme Court of British Columbia (Begbie, C.J., and Crease, J., present), on motion for judgment on demurrers of defendants to plaintiff's declaration, overruling demurrers, and judgment was rendered on motion for judgment on verdict previously rendered by a jury on

Practice of Supreme Court—Continued.

the trial of issues of fact, allowing plaintiff to enter judgment for \$5,000 the amount of said verdict. On the 4th July following defendants' solicitor served a notice of appeal to the Supreme Court of Canada on plaintiffs solicitor and of his intention to apply to the Chief Justice of the S. Ct. of B. C. next day for allowance of such appeal upon giving of such security as might be lawfully required. On the 5th July, defendants' solicitor attended before the Ch. J. who refused to allow an appeal, on the ground that the judgment on the demurrers was the judgment of the full court, but judgment on motion for judgment on verdict was his own judgment from which no appeal would lie until re-heard before the full court, and that under the Local Administration of Justice Act, 1881, a full court could not be held until the lapse of about a year from that date. The defendants' solicitor then and several times afterwards tendered to the Ch. J. and to the registrar of said court the sum of \$6,500, \$6,000 having been asked by plaintiff's solicitor as security under s. 32 s-s. 5 of the S. & E. C. Act, and \$500 being as security for the costs of appeal, but the Ch. J. refused to allow it to be paid into court.

On the 11th July, 1881, the Ch. J. of B. C. ordered that upon paying to the plaintiff \$1,000 and his taxed costs of suit, execution should be stayed and defendants have leave within four days after next sitting of full court to move such court for a re-hearing of the argument on the demurrers, and to move for a new trial, or to enter judgment for defendants.

On the 23rd August, 1881, the agent of defendants applied to Strong, J., in chambers for leave to give security. The application was refused because made in vacation and not on notice.

On the 13th September following, the agent for defendants' solicitor renewed his application to a judge of the Supreme Court of Canada.

An order was made allowing defendants to pay into the Supreme Court of Canada \$500 as security for the costs of appeal.

Per Fournier, J., in Chambers.

Bank of B. N. A. v. Walker.—13th September, 1881.

132. Security—Appeal—The constitutionality of s. 43, Ontario Judicature Act doubted—Security for costs allowed to be given under s. 31, S. & E. C. Act as amended by s. 14, S. C. Am. Act, 1879.

On the 15th day of September, 1882, an appeal to the Court of Appeal for Ontario, in which the defendants were appellants and the plaintiff was respondent, was dismissed. The matter in controversy in the action amounted to the sum of \$576.30, exclusive of costs. The defendants, on said 15th day of September, applied to the Court of Appeal, under section 43 of the Judicature Act of Ontario, for special leave to appeal from judgment of said Court of Appeal to the Supreme Court of Canada, and the Court of Appeal refused to grant such special leave. The defendants thereupon made an application to Mr. Justice Fournier in Chambers for leave to appeal from said judgment of the Court of Appeal, or for an order that defendants be at liberty to give proper

Practice of Supreme Court—Continued.

security to the satisfaction of the Supreme Court or a judge thereof, that they would effectually prosecute their appeal, or for such further or other order as the judge or court might direct. This application was made on the 4th day of October, 1882, being within thirty days after the said judgment was pronounced. Mr. Justice Fournier, finding that the point as to the validity of the section in question of the Judicature Act of Ontario had been raised by the application, referred it to the full court.

In the course of the argument the court expressed great doubts as to the constitutionality of the 43rd section of the Ontario Statute, but as the appellant's counsel abandoned the first alternative of his motion the court, exercising the powers conferred by the 31st section of the Supreme and Exchequer Court Act, 1875, as amended by the 14th section of the Supreme Court Amendment Act of 1879, **Ordered**, that the second alternative of the said motion should be granted, and that the said appellant should be at liberty to pay the sum of \$500 into the Supreme Court to the credit of the registrar thereof as security for the costs of the appeal.

Forristal v. McDonald (18 C. L. J. 421).—November 7, 1882.

[In *Clarkson v. Ryan*, 17 C. S. C. R. 251, the Supreme Court dealt with s. 43 of the Ontario Judicature Act, and expressly declared it to be *ultra vires* of the provincial legislature. See Legislature, 17].

133. Security—Application for allowance of.

Motion on behalf of defendant for approval of security and allowance of appeal.

Held, that a similar application having been made to Gwynne, J., in chambers, and refused, and the application being in any event one which should be made in chambers, the application could not be entertained.

MacNab v. Wagler.—February, 22, 1884.

134. Security—Application for leave to give—S. & E. C. Act, ss. 25 & 26—S. C. A. Act (1879), s. 14.

Appellant had applied to a judge of the Court of Appeal for Ontario, under s. 26 of the S. & E. C. Act, for further time to appeal. After considering all the circumstances, the judge refused the application. The appellant then applied to Ritchie, C.J., in chambers for leave to give security under s. 31, S. & E. C. Act, as amended by s. 14, S. C. Am. Act, 1879.

Held, that the applications must be dismissed with costs.

The Chief Justice was of opinion that the parties having applied to a judge of the court below, who was familiar with and had considered all the facts, the decision of such judge ought not to be interfered with, even if a judge of the Supreme Court were not bound as to time by s. 25, S. & E. C. Act. He was inclined to hold, however, that an application to the Supreme Court, or a judge thereof for leave to give security pursuant to s. 31, S. & E. C. Act, as amended, should be made within the time limited by s. 25, or such further time as a judge of the court below may have allowed under s. 26.

Per Ritchie, C.J., in chambers.

Walsley v. Griffiths.—January 14, 1885.

Practice of Supreme Court—Continued.

[The Court of Appeal for Ontario has held that no appeal lies to that court from a judgment of a judge of that court extending time for appealing, under s. 26, S. & E. C. Act. *Neill v. Travellers' Insurance Co.*, 9 Ont. App. R. 54].

135. Security—Bond, form of—If objected to, should be by application in chambers to dismiss.

A bond for security of costs of appeal to Supreme Court should provide for the prosecution of the appeal.

If an objection is made to the form of a bond for security for costs on appeal to the Supreme Court it should be by application in chambers to dismiss, and if not so made the objection will be held to be waived.

Whitman v. Union Bank of Halifax.—xvi. 410.

136. Security—Bond not given to parties interested in appeal.

Where the bond for security of costs of appeal has not been given to the parties really interested in the appeal and before the court, the appeal will not lie.

See JURISDICTION, 61.

137. Security—Application to allow, refused by court below—Renewal of application to Supreme Court.

An appellant is not estopped from applying to a judge of the Supreme Court under s. 46, merely by having already applied to a judge of the court below who has refused the application.

Ontario and Quebec Ry. Co. v. Marcheterre.—xvii. 141.

138. Security—Allowance of.

In s. 42 of the S. & E. C. Act, (R. S. C. c. 135), the expression "allow an appeal" means only that the court or judge may settle the case and approve the security.

Per Strong, J., in

Vaughan v. Richardson.—xvii. 703.

139. Security—Condition precedent to appeal.

Except in cases specially provided for, no appeal can be heard by the Supreme Court unless security for costs has been given as provided by s. 46 of the S. & E. C. Act, R. S. C. c. 135.

Per Ritchie, C.J. and Taschereau, J.

In re Cahan.—xxi. 100.

See JURISDICTION, 100.

140. Technical objection.

Technical objection not taken in the court below, cannot be allowed to prevail in appeal, following the rule of the Privy Council.

Per Taschereau, J.

See CONTRACT, 10.

Practice of Supreme Court—Continued.**141. Time—Application for further time in appeal from B.C.**

On the 12th October, 1881, the agent for defendants' solicitor applied for three months further time to file the case and factums, showing by affidavit that the day the order had been made by a judge of Supreme Court, allowing \$500 to be paid into the Supreme Court of Canada, as security for the costs of appeal, the 13th September, 1882, the \$500 had been paid in; that the next day the papers had been mailed to the defendants' solicitor at Victoria, B.C., to enable him to prosecute his appeal; that a letter took about three weeks to reach Victoria from Ottawa; that he had on the 7th October received a telegram (produced) from defendants' solicitor, saying: "Papers just received; get time extended," and that he verily believed unless three months further time was granted to prepare and print case and factums and transmit them, grave injustice would be done.

An order was thereupon made giving until 1st December then next to have case printed and filed with the Registrar of the Supreme Court of Canada.

Per Ritchie, C.J., in chambers.

Bank of B. N. A. v. Walker.—12th October, 1881.

142. Time, application to extend—When limit fixed by order of full court within which case to be filed—Case, not settled through delay of respondent—Further time given and respondent ordered to pay the costs.

On the 12th September, 1882, the agents of the defendants' solicitor moved before the Chief Justice of the Supreme Court of Canada (in chambers), for an order to extend the time mentioned in the order of the court of the 22nd June, 1882, for filing the case (*see Damages 25, at page 218*), until the 1st January, 1883, or for an order that a writ of *certiorari* should issue to the Supreme Court of B. C. or to the Chief Justice, or the registrar thereof, to bring up all the papers in said cause, or for a stay of proceedings under the order of the 22nd June, 1882, until application could be made to the full court at its next session for such relief as the appellants might be entitled to, or for an order allowing defendants to file a printed copy of "case" then produced as the "case" required by s. 29 of the S. & E. C. Act, 1875, notwithstanding the same had not been transmitted by the Registrar of the Supreme Court of B. C., nor certified under the seal of that court, or for such other order as the parties might be deemed entitled to.

Upon hearing the parties and reading the affidavits in support of the application, his lordship the Chief Justice enlarged the motion to be heard before the full court on the first day of the next session, gave permission to the parties to file further affidavits to be used upon said motion, the same being first served upon the solicitors of the respective opposite parties in B. C., and stayed all proceedings under the order of the 22nd June, 1882, until the hearing of the motion before the full court and the final disposition thereof.

On the 25th October, 1882, the motion was heard before the full court. In support of it affidavits were read by counsel for the defendants to the effect: that the order of the 22nd June, 1882, reached the defendants' solicitor on

Practice of Supreme Court—Continued.

the 12th July following. On the 18th July he left a draft copy of the "case" with the Chief Justice of Supreme Court of British Columbia, and obtained from him and served upon the solicitor for the plaintiff an appointment to settle the "case" on the 25th July; that on the 25th July the draft copy of the "case" was handed to the counsel for plaintiff for his perusal, and the Chief Justice appointed the 27th July to settle it; that on the 27th July the Chief Justice settled the "case" and handed it to defendants' solicitor, who immediately put it in the hands of the printer, and who corrected the proof and handed the printed sheets as they were ready to respondents' counsel; that on the 16th August all the printed sheets, with the exception of the last two or three pages, were handed to the registrar of the Supreme Court of British Columbia, who said the Chief Justice wished to see all the sheets, and they were all handed to the registrar next day with the original as settled, and the solicitor made an appointment to apply for his certificate on the following day; that he attended the Chief Justice by request, who proposed to revise and alter the printed copy of his charge and judgment, and who said he would hand to the registrar a page of corrections and additions to be printed; that upon requesting the registrar to certify the "case," he refused to do so, after consulting the Chief Justice, on the ground that the Chief Justice instructed him it was not properly corrected; that the "case" so handed to the registrar for his certificate was a true and complete copy of the "case" as settled by the Chief Justice, and contained every document handed in at the trial as evidence; that the utmost diligence had been used, and that it would be impossible to alter or reprint the "case" in whole or in part and file it within the time limited by the order of the 22nd June, 1882; that upon refusal of the registrar to certify he had on the 21st August, 1882, taken out a summons calling upon the plaintiff and registrar of the Supreme Court of British Columbia to shew cause why the registrar should not be directed to transmit the "case" settled on the 27th July, 1882, to the registrar of the Supreme Court of Canada; that no evidence was offered in opposition to such application; that the Chief Justice stated that he had settled the MS. "case," but had not compared the printed copy with the MS., and he ought to have had the opportunity of revising the proof sheets, and until he had done so he did not consider that the "case" was settled; that counsel had thereupon suggested that the MSS. copy might be transmitted, but the Chief Justice refused to make any order upon the said application; and that the registrar of the court below had been requested either to return the original "case" to the defendants' solicitor, or send it to the registrar of the Supreme Court of Canada, but had replied that the Chief Justice was using it.

On behalf of the plaintiff was read an affidavit of the registrar of the Supreme Court of B. C. to the effect that no draft MSS. "case" settled by the C.J. of the Supreme Court of B. C. had been filed with him; that there had been a reference to the C.J. by counsel for the defendants on the 27th July, then last (1882) to settle some points of disputed evidence, and the points so referred were settled by the C.J., but that he was informed by the C.J. that except as aforesaid no "case" was settled by him, and no completed "case" was ever submitted to him for revision until a bound "case" was handed to him.

Practice of Supreme Court—Continued.

An affidavit of the counsel who had appeared for plaintiff before the C.J. of the Supreme Court of B. C. on the 27th July, 1882, stated that he attended to settle the MS. "case" as far as prepared; that none of the exhibits or documents which were produced at the trial, or the judgments, were then printed or submitted to him, and he (the defendant) never settled the "case" as printed; that certain parts of the evidence were greatly incorrect and not in accordance with the notes of the C.J. who tried the case; and that several documents which were produced in evidence were omitted from the "case" and that he had requested them to be inserted, without effect.

And an affidavit of the plaintiff's solicitor stated that on the application made on the return of the summons of the 21st August, 1882, he had found the "case" incorrect in certain particulars, and had consented to the "case" going forward if these were corrected.

Counsel for both parties were heard, and counsel for defendants stated that if any part of the record had been omitted from the "case" they were and had been ready to have it added.

The Supreme Court of Canada was of opinion that whether the "case" had been settled or not by the C.J., it certainly was not through the fault or laches of the defendants that it had not been settled, but from the delays and laches of the plaintiff, and it ought to have been settled; and the court ordered that notwithstanding the order of the 22nd June, 1882, the time for filing the "case" and depositing the factum of the appellants should be extended to the 1st of January, 1883, and the appellants should be at liberty to bring the appeal on for hearing at the next sessions thereafter; that the appellants should be at liberty to apply to a judge of the Supreme Court of Canada in chambers, to extend any time thereby limited until the first day of the next sessions of the court, or until an order upon any such application could be heard and disposed of by the court; that the appellants might then apply to the court for any further or other relief as might seem just; and that the respondent (plaintiff) should pay to the appellants the sum of \$20 as the costs of the motion before the Chief Justice, and the further sum of \$50 as the costs of the motion before the full court.

The court intimated that if any further obstacles were placed in the way of the appellants the court would take the necessary means to have a speedy hearing of the appeal.

Bank of B. N. A. v. Walker.—October 26, 1882.

143. Time for appealing under S. & E. C. Act, s. 25—Security under s. 31, as amended by s. 14 of the S. C. A. Act (1879).

Judgment was pronounced in the Court of Appeal for Ontario on the 30th June, 1884. Vacation begins in that court on the 1st of July and ends on the 30th August. On the 13th September the respondent, the appeal having been allowed, deposited \$500 as security for the costs of an appeal to the Supreme Court of Canada and applied for leave to appeal. The Court of Appeal was of opinion that the security, not having been deposited within thirty days of the pronouncing of the judgment, was given too late, as the vacation did not inter-

Practice of Supreme Court—Continued.

rupt the running of the time allowed by the statute, S. & E. C. Act, s. 25, for appealing.

The judgment of the Court of Appeal was not entered until November 14th, 1884, the delay having been occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. Such question was discussed before one of the judges, and subsequently before the full court before being finally determined.

On November 27, 1884, the respondent in the Court of Appeal applied to a judge in chambers of the Supreme Court of Canada, for leave to give security under s. 81 of the Supreme Court Act, as amended by s. 14 of the Supreme Court Amendment Act of 1879. This application was referred to the full court.

Held, that the time for bringing the appeal, in this case, under s. 25 of the Supreme Court Act, began to run from the 14th November, 1884, the date of entry of the judgment of the Court of Appeal.

In appeals coming from the province of Quebec, the time for appealing runs in every case from the pronouncing of the judgment, owing to the peculiar form of procedure in that Province.

Where any substantial matter remains to be determined before the judgment can be entered, the time for appealing runs from the entry of the judgment. Where nothing remains to be settled, as for instance, in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

Motion granted.

O'Sullivan v. Harty.—16th March, 1885.—xiii. 431.

144. Time for appealing under S. & E. C. Act, s. 25, to run from pronouncing of judgment—Dismissal of plaintiff's bill.

Where the Court of Appeal for Ontario reversed the judgment of the Vice-Chancellor in favour of the plaintiff, and dismissed the action :

Held, that in such case no substantial question could remain to be settled before the entry of the judgment, and the time for appealing to the Supreme Court of Canada would therefore run from the pronouncing of the judgment. *O'Sullivan v. Harty*, 13 C. S. C. R. 431 ; see Practice, 143, distinguished.

Walmsley v. Griffith.—xiii. 434.

145. Time—Entry of judgment—S. & E. C. Act, s. 25.

Appeal from the Supreme Court of British Columbia, in an action respecting water rights brought by one Carson and one Eholt, against one Martley and one Clark.

Judgment was pronounced 20th August, 1885. On the 28th August the defendant gave notice of appeal and security, and obtained from the plaintiffs (respondents) a consent to three months' further time being given to file the case. The three months having expired without the case being ready, the appellants applied in chambers to Ritchie, C.J. of the Supreme Court of Canada, for further time to appeal. This application was refused on the

Practice of Supreme Court—*Continued.*

ground that the appellants had not satisfactorily accounted for the delay. On the 8th January, 1886, the minutes of the judgment were settled. On the 9th January the plaintiff's (respondents) moved before the full court of British Columbia to vary the minutes. The minutes were varied by striking out certain declarations respecting the rights of the plaintiff Carson and the defendant Martley respectively, and also with respect to the costs payable by the plaintiff Eholt. On the 26th of January, 1886, the judgment of the court below was entered. The appellants next day gave fresh notice of appeal, and applied to a judge for an allowance of the appeal on the notice of the 27th January, and for a continuation of the existing securities for appeal, and for an order settling the case. The judge refused to entertain the application, so far as it referred to the allowance of the appeal on the notice of the 27th January, and to the continuation of the existing securities, pending the appeal then existing to the Supreme Court of Canada.

Counsel for respondent argued that the time ran from the pronouncing of the judgment, the 20th August, 1885; that there was nothing to settle by the minutes, and they could have been settled and ought to have been settled without any necessity for any application to vary, and the case did not come within the exception laid down in *O'Sullivan v. Harty*, in which it was held that the time for appealing would run from the date of the pronouncing of the judgment, unless something substantial remained to be settled and entered. That it was open to either party to have the judgment drawn up.

Counsel for appellant contended that the bond given as security was a continuing security; that the time for appealing in every case ran from the entry of the judgment, but in any event it did so in this case, there having been something substantial to settle, and the court below did vary the minutes of the order. The appellants could not complete their case until the judgment of the court below was settled. The appeal had been delayed only one session.

Held, that the case came fairly within the exception mentioned in *O'Sullivan v. Harty*, 18 C. S. C. R. 481, and the appeal should be heard.

The respondents had not filed their *factum*, supposing it was unnecessary to do so, while the motion to dismiss was pending. The appellants had, therefore, inscribed *ex parte*. The court was of opinion much of the delay was owing to the fault of the appellants. The motion was refused, and the appeal ordered to stand over till the next session of the court, the respondents to file *factum* in the meantime.

Martley v. Carson.—17th May, 1886—xiii. 489.

146. *Time—For filing habeas corpus appeal.*

In *habeas corpus* appeal, the first proceeding is the filing of the case with registrar. This must be done within sixty days from the pronouncing of judgment appealed from.

See JURISDICTION, 58.

Practice of Supreme Court—Continued.**147. Time—Notice of appeal—S. & E. C. Act, R. S. C. c. 135, s. 41.**

The time for giving notice of appeal under-section 41 of the S. & E. C. Act, R. S. C. c. 135, can be extended as well after as before the twenty days have elapsed.

Vaughan v. Richardson.—xvii. 703.

148. Vacation.

On the 28rd August, 1881, (in vacation) the agent of the defendants' solicitor applied to a judge of the Supreme Court (Strong, J.), for leave to give security under section 31, S. & E. C. Act as amended by section 14 of S. C. Am. Act, 1879.

The judge refused to make any order on two grounds:—1. Because it did not appear to him a proper application for vacation, not being urgent; and 2. Because the application ought to be made on notice and not *ex parte*.

Bank of B. N. A. v. Walker.—23rd August, 1881.

149. Vacation—Time, extending.

Motion on behalf of respondent to dismiss appeal for want of prosecution. The judgment of the Court of Appeal was pronounced on the 30th day of June, 1885. On the 8rd July following the appellant put in his bond for security for costs, which was allowed, but being under the impression that the time of vacation did not count, he took no steps to further prosecute his appeal. Notice of motion to dismiss was given on the 17th September, 1885, and was shortly afterwards heard before Henry, J., in Chambers, who held, that under the circumstances, the time for filing the case should be extended to the 10th of October, then instant.

Motion dismissed without costs.

Herbert v. Donovan.—3rd October, 1885.

Precious Metals—Claim of Dominion to, on transfer of public lands of Province—B. N. A. Act, 1867, s. 92, s-s. 5, ss. 109 & 146—47 V. c. 14, s. 2 (B. C.).

See MINES AND MINERALS, 2.

Preference—Assignment in trust for creditors—Unreasonable provision for unpreferred creditors—Resulting trust—Statute of Elizabeth.

See ASSIGNMENT, 12.

2. Assignment for benefit of creditors—R. S. O. (1887) c. 124, s. 2—Construction of.

See ASSIGNMENT, 15.

3. Chattel mortgage—Preference by—Pressure—Intent.

See ASSIGNMENT, 21.

Preference—Continued.

4. Composition—Loan to effect payment—Mortgage—Action to set aside as fraudulent—Arts. 1082, 1039 & 1040, C. C.

See FRAUDULENT PREFERENCE, 9.

5. *Mortgage—Preference by—Pressure—R. S. O. (1887) c. 124, s. 2.*

A mortgage given by a debtor who knows that he is unable to pay all his debts in full is not void as a preference to the mortgagee over other creditors if given as a result of pressure and for a *bona fide* debt and if the mortgagee is not aware of the debtor being in insolvent circumstances. *Molsons Bank v. Halter*, 18 Can. S. C. R. 88 and *Stephens v. McArthur*, 19 Can. S. C. R. 446, followed.

Gibbons v. McDonald.—xx. 587.

6. Hypothec to the prejudice of creditors—Notorious insolvency of mortgagors—Art. 2023, C. C.

See INSOLVENCY, 80.

ASSIGNMENT.

CHATTEL MORTGAGE.

FRAUDULENT PREFERENCE.

INSOLVENCY.

Preliminary Objections—

See ELECTION.

Prerogatives of the Crown—

See BRITISH NORTH AMERICA ACT, 1867.

CONSTITUTIONAL LAW.

CROWN.

PETITION OF RIGHT.

Prescription—Loan—By a non-trader to a trader—Arrears of interest—Acknowledgment of debt, what sufficient—Evidence.

In 1858, W. D., sr., opened a credit of \$584, in favour of his daughter I. D., with W. D. & Co., a commercial firm in Montreal, consisting of the appellant and one T. D., W. D. & Co. charging W. D., sr., and crediting I. D. with that amount. In 1860, W. D., as sole executor of the will of D. D., credited I. D. in the books of W. D. & Co., (appellant at that time being the only member of the firm) with a further sum of \$800, the amount of a legacy bequeathed by such will. These entries in the books of W. D. & Co., together with entries of interest in connection with the said items, were continued from year to year. An account current was rendered to I. D. exhibiting details of the indebtedness up to the 31st December, 1861. After 31st December, 1864, the firm of W. D. & Co. consisted of the appellant and his brother T. D. In December, 1865, another account was rendered to I. D., which showed a balance due her at that

Prescription—Continued.

time of \$1,912.08. The accounts rendered were unsigned, but the second account current was accompanied by a letter, referring to it, written and signed by the appellant. I. D. died, and in a suit brought by G. T., her husband and universal legatee, to recover the \$1,912.08, with interest from 31st December, 1865.

Held, 1. That a loan of moneys, as in this case, by a non-trader to a commercial firm is not a "commercial matter" or a debt of a "commercial nature;" that, therefore, the debt could be prescribed, neither by the lapse of six years under Consolidated Statutes of Lower Canada, c. 67, nor by the lapse of 5 years under the Civil Code of Lower Canada, but only by the prescription of 30 years. *Whishaw v. Gilmour*, 15 L. C. R. 177, approved.

2. That, even if the debt were of a commercial nature, the sending of the account current accompanied by the letter referring to it signed by the appellant would take the case out of the statute.

3. That the prescription of five years against arrears of interest, under Art 2250 of the Civil Code of Lower Canada, does not apply to a debt, the prescription of which was commenced before the code came into force.

4. That entries in a merchant's books make complete proof against him.

Darling v. Brown.—i. 360.

2. In action against Executor for an account.

See EXECUTORS, 1.

3. Renunciation to communauté—Title to real estate belonging to.

See OPPOSITION, 1.

4. Crown can plead.

See PETITION OF RIGHT, 3.

5. Action by substitute—Art. 2268, C. C.

See WILL, 10.

6. Light and Air, interfering with.

See EASEMENT, 3.

7. Interruption of—C. C. P. 345, 346.

See CONTRACT, 10.

8. In action for Malicious Prosecution—Arts. 2262, 2267, C. C.

See MALICIOUS PROSECUTION.

9. Continuance of cause, so as to suspend prescription under 37 V. c. 15, (Q.).

See AGREEMENT, 10.

Prescription—Continued.

10. Action for compensation for use and occupation of land—Quasi délit — Prescription of two years under Arts. 2261, 2267, C. C.—Prescription of five years under Art. 2250, C. C.—Tribunal bound to give effect to, though not pleaded—Art. 2188, C. C.

See LAND, 3.

PREScription, 12.

11. Yearly salary—Arts. 2260, 2261, C. C.—Moneys expended for estate—Executor, power to hire clerk—Art. 914, C. C.

See CONTRACT, 26.

12. *Objection taken in appeal.*

Held, that although the objection that the right of action has been prescribed is taken for the first time on the argument in appeal, the court is bound to entertain it and give effect to it if properly raised.

Appeal allowed but without costs in any of the courts.

Dorion v. Crowley.—17th May, 1886.

See LAND, 3.

13. Sale by minor—Action to annul—Arts. 2243, 2253, C. C.

See TUTOR AND MINOR.

14. Transfer of mortgages, etc., and promissory notes as security for price of sale—Property not paid for—Action for price—Plea of—Prescription as to notes not available in.

See TRUSTS AND TRUSTEES, 15.

15. Action against railway company—Damage by fire—R. S. C. c. 109, s. 27—51 V. c. 29, s. 287 (D.).

See RAILWAYS AND RAILWAY COMPANIES, 53.

16. Construction of dam—Damage to land by—Arts. 503, 549, C. C.

See RIPARIAN PROPRIETORS, 4.

17. Suit against succession—Escheat—Tierce-opposition—Arts. 2216, 2242, 2265, 2187, C. C.

See PRACTICE, 14.

18. Agreement for use of land—Construction of—Adjoining lands—Way of necessity—License.

See EASEMENT, 6.

Prescription—Continued.**19. Moneys entrusted for investment—Condition precedent—Prescription—Art. 2262—Transfer—Prête-nom.**

H. having funds belonging to one T. J. C. for investment, agreed to invest them with M. of Winnipeg in a certain land speculation, and after correspondence accepted and paid M.'s draft for \$2,375, mentioning in the letter notifying M. of the acceptance of the draft the understanding H. had as to the share he was to get and adding: "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed and the conditions of the prospectus never carried out. T. J. C. transferred *sous seing privé* this claim to the plaintiff who brought an action against M. for the amount of the draft.

Held, affirming the judgment of the courts below, that the action being for the recovery of a sum of money entrusted to the defendant for a special purpose, the prescription of two years did not apply. Art. 2262, C. C.

Moodie v. Jones.—xix. 266.

20. Injury resulting in death—Claim of widow—Prescription—Arts. 1056, 2261, 2262, 2267, 2188, C. C.—Arts. 431, 433, C. P. C.

The husband of respondent was injured while engaged in his duties as appellants' employee and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the lifetime of the husband the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death.

Held, Fournier, J., dissenting, that at the time of the death of respondent's husband all right of action was prescribed under Art. 2262, C. C. and that this prescription is one to which the tribunals are bound to give effect although not pleaded. Arts 2267 and 2188, C. C.

The Canadian Pacific Railway Co. v. Robinson.—xix. 292.

[Reversed by the Judicial Committee of the Privy Council; [1892] App. Cases 481.]

See ACTION, 8.

21. Negligence of servant—Crown—Liability of—50 & 51 V. c. 16—Arts. 2262, 2267, 2188, 2211, C. C.

Held, that even assuming that under the common law of the province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable for an injury caused by negligence of its servants, such injury having been received more than a year before the filing of the petition the right of action was prescribed under Arts. 2262 and 2267, C. C.

Per Patterson, J., the Crown is made liable for damages caused by the negligence of its servants operating government railways by 44 V. c. 25, R. S. C.

Prescription—Continued.

c. 88, but as the petition of right in this case was filed after the passing of 50 & 51 V. c. 16 (1887) the claimant became subject to the laws relating to prescription in the province of Quebec, and his action was prescribed.

The Queen v. Martin.—xx. 240.

22. Length of—Petition in disavowal.

Held, following *McDonald v. Dawson*, 11 Q. L. R. 181, that the only prescription available against a petition in disavowal is that of thirty years.

Dawson v. Dumont.—xx. 709.

Principal and Agent.

See AGENT.

Priority of Registration.

See MORTGAGE, 1.

Privileged Communication—By public officer.

See SLANDER, 1.

Privy Council—No application for leave to appeal to, can be entertained by the Supreme Court of Canada.

See PRACTICE OF SUPREME COURT, 122.

2. Judgment of, reversing judgment of Supreme Court—Making it rule of Supreme Court—Order of Supreme Court directing repayment of costs paid under judgment reversed.

See APPEAL, 17.

3. *Appeal to, from Supreme Court of Canada.*

The principles upon which an appeal will be allowed to the Privy Council do not admit of anything approaching to exhaustive definition. No rule can be laid down which might not be subject to future qualification. *Prince v. Gagnon*, 8 App. Cases 103, commented on.

See judgment of Privy Council in **Les Ecclesiastiques de St. Sulpice de Montreal v. City of Montreal.**—xvi. 407.

On this question as to the principles upon which an appeal will be allowed to the Privy Council, the following cases may be referred to:

Johnston v. The Ministers, etc., of St. Andrews Church, Montreal, 3 App. Cases, 159. And *Bank of N. B. v. McLeod*.

See PEWHOLDER.

Gagnon v. Prince, 8 App. Cases, 103.

See EVIDENCE, 8.

Montmorency Election Case, 5 App. Cases, 115.

See ELECTION, 4.

Canada Central Ry. Co. v. Murray, 8 App. Cases, 574.

Privy Council—Continued.

See AGREEMENT, 6.

Dumoulin v. Langtry, 57 L. T. N. S. 817.

See RECTORY LANDS.

Grand Trunk Railway Company v. McMillan.

See RAILWAYS AND RAILWAY COMPANIES, 43.

Glengarry Case, (*Purcell v. Kennedy*), 59 L. T. 279; 4 Times L. R. 664, and *Cassels's Manual of Supreme Court Practice*, 86.

Gregory v. Atty.-Gen. of N.S.; 11 App. Cases. 229.

4. For a list of cases in which the judicial committee has granted or refused leave to appeal from the Supreme Court of Canada.

See APPENDIX, A.

Procedure—Power of Legislature of British Columbia to legislate respecting.

See LEGISLATURE, 12.

2. When the court below has adjudicated upon a mere matter of procedure the Supreme Court will not interfere.

See JURISDICTION, 32, 35.

Proces Verbal—Of seizure by sheriff—What it should contain—Art. 638, C. C. P.

See SHERIFF, 3.

Prohibition—Writ of prohibition to municipal corporation—Assessment roll, amendment of—Arts. 716 & 746a, municipal code, (P.Q.)

The municipal corporation of the county of H., in the Province of Quebec, made an assessment roll according to law in 1872. In 1875 a triennial assessment roll was made, and the property subject to assessment was assessed at \$1,745,588.58. In 1876, without declaring that it was an amendment of the roll of 1875, the corporation made another assessment in which the property was assessed at \$3,138,550. Among the properties that contributed towards this augmentation were those of appellants, who, by their petition, or *requête libellée*, addressed to the Superior Court, (P.Q.), alleged that the secretary-treasurer of the county of H. was about selling their real estate for taxes under the provisions of the municipal code for the Province of Quebec, 34 V. c. 68, s. 998 *et seq.*, and prayed to have the assessment roll of 1876, in virtue of which the officer of the municipality was proceeding to sell, declared invalid and null and void, and that a writ of prohibition should issue to prevent the respondents from proceeding to sell. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits, held the roll of 1876 valid as an amendment of the roll of 1875.

Prohibition—Continued.

The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially a new roll, and therefore null and void.

Held, per Henry, Taschereau and Gwynne, JJ., affirming the judgment of the Court of Queen's Bench, that the roll of 1876, not being a triennial assessment roll, or an amendment of such a roll, was illegal and null, and that respondents were entitled to an order from the Superior Court as prayed for, to restrain the municipal corporation from selling their property, and the writ which issued, whether correctly styled "writ of prohibition" or not, was properly issued and should be maintained.

Per Ritchie, C J., and Strong and Fournier, JJ., that a writ of prohibition issued under Art. 1081, as was the writ issued in this case, will only lie to an inferior tribunal, and not to a municipal officer.

The court being equally divided, the judgment appealed from was confirmed, but without costs.

Cote v. Morgan.—vii. 1.

2. To revise conviction of recorder—Police regulations for sale of liquors—42 & 43 V. c. 4 (P.Q.)

See LEGISLATURE, 10.

3. To prohibit proceedings for recovery of balance of mortgage debt after foreclosure.

See MORTGAGE, 12.

4. *County court—Jurisdiction of—Proceedings after plea to jurisdiction sustained on demurrer—Prohibition, writ of.*

An action of trover was brought against defendants in the County Court, at Halifax, N. S., to which they pleaded a number of pleas including one to the jurisdiction of the court. This plea was based on an allegation that the goods for which the action was brought, were of the value of \$600, the jurisdiction of the court in actions of tort being limited to \$200. The plaintiff demurred to the plea of want of jurisdiction, and after argument the demurrer was over-ruled. No appeal was taken from the judgment over-ruling the demurrer, but the plaintiff gave notice of trial, and entered the cause for trial at chambers before the County Court judge, who announced his intention of trying the same on the remaining pleas. The defendants obtained a rule *nisi* for a writ of prohibition to restrain the judge from trying the cause, on the ground that the judgment on the demurrer disposed of the whole case, and on argument of the said rule *nisi* it was discharged.

On appeal to the Supreme Court of Canada, **Held, Strong, J.**, dissenting, that the effect of the judgment on the demurrer was to quash the writ, and the rule *nisi* for a writ of prohibition should be made absolute.

Per Strong, J., dissenting, that the judgment of the County Court judge on the demurrer did not dispose of the case, but he had a right to reconsider the same on the trial of the issues raised by the other pleas: that the plea to the jurisdiction by attorney was null and void and if judgment had been

Prohibition—Continued.

entered of record on the demurrer such judgment would have been likewise null and void; and that the amount claimed by the plaintiff's declaration being over \$200 the court had jurisdiction.

Appeal allowed with costs.

Wallace v. O'Toole.—16th February, 1885.

5. Licensed brewers—Quebec License Act—41 V. c. 3 (Q.), constitutionality of—Prohibition to Court of Special Sessions of the Peace, Montreal.

See LEGISLATURE, 14.

6. By-law respecting sale of meat in private stalls—Validity of—Prohibition to Recorder's Court and city of Montreal—37 V. c. 51, s. 123, s-s. 27 & 31 (P.Q.)—Power of Provincial Legislature to pass—B. N. A. Act (1867), s-s. 9 of s. 92—"Other licenses."

See LEGISLATURE, 18.

7. *Restraining inquiry ordered by city council—R. S. O. (1887) c. 184, s. 477—Functions of county court judge.*

The council of the city of Toronto, under the provisions of R. S. O. (1887) c. 184, s. 477, passed a resolution directing a county court judge to inquire into dealings between the city and persons who were or had been contractors for civic works and ascertain if the city had been defrauded out of public monies in connection with such contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts with the city; and to ascertain in what respect, if any, the system of the business of the city in that respect was defective. G., who had been a contractor with the city and whose name was mentioned in the resolution, attended before the judge and claimed that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the judge refusing to order such charges to be formulated he applied for a writ of prohibition.

Held, affirming the judgment of the Court of Appeal for Ontario, Gwynne, J., dissenting, that the county court judge was not acting judicially in holding this inquiry; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a superior court.

Held, *per* Gwynne, J., that the writ of prohibition would lie and in the circumstances shown it ought to issue.

Godson v. The City of Toronto.—xviii. 36.

8. Notarial Code—R. S. Q., Art. 3871—Board of notaries—Disciplinary powers.

See NOTARY, 4.

Promise of Sale.

See SALE OF LANDS, 2.

Promoters—(Of company—Action against, for fraudulent misrepresentations—Alleged false statements in prospectus issued by.

See CORPORATIONS, 24.

Prospectus—Alleged false statements in—Liability of promoters.

See CORPORATIONS, 24.

Protutor—Liability of, for negligence.

See EXECUTORS, 4.

Public Lands—B. N. A. Act (1867), s. 92, s-s. 5; ss. 109 & 146—47 V. c. 14, s. 2 (B.C.)—Provincial public lands, transfer of, to Dominion—Precious metals.

See MINES AND MINERALS, 2.

2. *British Columbia*—Order in Council admitting into confederation, s. 11—47 V. c. 14, s. 2 (B.C.)—Lands set apart for C. P. Ry.—Effect of—Provincial Crown grant—Illegality of.

By s. 11 of the Order in Council admitting the province of British Columbia into confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the legislature of British Columbia passed the statute 47 V. c. 14, by which it was enacted *inter alia* as follows:—
 “From and after the passing of this Act there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific railway on the main land of British Columbia, in trust, to be appropriated as the Dominion government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the Order in Council, s. 11, admitting the province of British Columbia into confederation.” On the 20th November, 1883, by public notice the government of British Columbia reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, the respondent, in order to comply with the provisions of the provincial statutes, filed a survey of a certain parcel of land, situate within the said belt of 20 miles, and the survey having been finally accepted on 18th January, 1885, letters patent under the great seal of the province were issued to F. for the land in question. The Attorney-General of Canada by informa-

Public Lands—Continued.

tion of intrusion sought to recover possession of the said land, and the Exchequer Court having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was :—

Held, reversing the judgment of the Exchequer Court, Henry, J., dissenting, that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the Crown for the use and benefit of Canada.

The Queen v. Farwell.—xiv. 392.

Public Works—Work for government railways—Damages to property by—Indemnification—Parol undertaking by officer of the Crown.

See CONTRACT, 47.

Q.

Quakers.—*Title to land—Society of Friends, or Quakers—Lands held in trust for—Authority of governing body.*

The supreme or governing body of the Society of Friends, or Quakers, in Canada, as well in respect to matters of discipline as to the general government of the society, is the Canada yearly meeting.—The Canada yearly meeting having adopted a book of discipline which certain members of the society refused to accept, these dissentient members, therefore, could not hold, nor exercise any right over, property granted to a subordinate branch of the society to which they had formerly belonged. Judgment of the court below affirmed.

Jones v. Dorland.—xiv. 39.

Quebec Turnpike Trust.—Debentures issued by—Liability of Crown for.

See PETITION OF RIGHT, 6.

Quo Warranto.—*Appeal—Jurisdiction.*

An appeal from a decision of the Court of Queen's Bench for Lower Canada, appeal side, M. L. Rep. 2 Q. B. 482, was quashed on motion for want of jurisdiction, the proceedings being by *quo warranto* as to which there is no appeal by the statute.

Walsh v. Heffernan.—March 8, 1887.—xiv. 738.

R.

Railways and Railway Companies—Mortgage by railway company—Contract of sale—Power of company to mortgage their road—Doctrine of ultra vires.

The Grand Junction Railway Company, a corporate body, having the statutory power to borrow money, issue debentures, bonds, or other securities for the sum so borrowed, to sell, to hypothecate or pledge the lands, tolls, revenues and other property of the company, and also power to purchase, hold and take any land or other property for the construction, maintenance, accommodation and use of the railway, and to alienate, sell or dispose of the same, entered into a contract with one Brooks for the construction of their road. When Brooks required the iron necessary for the undertaking, he was unable to purchase it without the assistance of the company, and he thereupon authorized the officers of the company to negotiate for its purchase. In consequence, a Mr. Bell, solicitor of the company, as agent of Brooks, and with the approval, in writing, of Kelso, the president of the company, entered into a written agreement, dated Toronto, 9th June, 1874, with the defendants (Bickford and Cameron) for the purchase of the iron, which was to be paid for as delivered on the wharf at Belleville by the promissory notes of Brooks, and a credit for six months was to be given from the time of the several deliveries of the iron. By that agreement also, Brooks agreed to obtain from the railway company an irrevocable power of attorney enabling the Bank of Montreal, who advanced to Bickford the money necessary for the purpose of buying the iron, to receive the government and municipal bonuses, and to procure from the company a mortgage for \$200,000 on that portion of their road (44 miles) on which the iron was to be laid—the mortgage to be sufficient in law to create a lien on the 44 miles of railroad, as security for the due payment of the notes of the said Brooks, but not to contain a covenant for payment by the company. On the 30th June, 1874, a more formal agreement, under seal, was executed, which did not vary in any material respect the terms of the preceding agreement. On the same day, a power of attorney (upon which was endorsed by Brooks a written request to the company to give the said power of attorney), and a mortgage (upon which also was endorsed by Brooks a request to grant the said mortgage), were executed by the company under their corporate seal to one Buchanan, then manager of the Bank of Montreal, in Toronto, as a trustee. The Bank of Montreal having made advances to Bickford in the ordinary course of their business dealings to enable him to purchase the iron, it was all consigned to their order by the bills of lading, and, when delivered on the wharf at Belleville, was held by the wharfingers subject to the order of the bank, the whole quantity stipulated for by the contract being so delivered ready for laying on the track as required. The Bank of Montreal and Bickford caused to be delivered from time to time to Brooks, by the wharfingers at Belleville, all the iron he required to lay on the track, being about 2,000 tons, and about an equal quantity remained on the wharf unused. Brooks having

Railways and Railway Companies—*Continued.*

failed to meet his promissory notes for the price of the iron, Bickford recovered judgment at law against him to the amount of \$164,852.96. The bank then sold the iron remaining on the wharf for the purpose of realizing their lien, when Bickford became the purchaser thereof at \$33.50 for the rails and \$50.50 for track supplies. Bickford was removing the said iron when the company filed a bill in chancery asking for an injunction to restrain the removal of iron. A motion to continue the injunction was refused on the 11th October, 1875. The defendants (Bickford, Cameron and Buchanan) then answered the bill, and on the 18th January, 1876, by consent, a decree was made referring it to the master to take the mortgage account, to ascertain and state the amount due to Bickford and Cameron for iron laid or delivered to or for plaintiff's use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances, if requisite. The master found due upon the mortgage \$46,841.10, the price of iron actually laid on the track, and interest; and that nothing was due in respect of the iron delivered at Belleville but subsequently removed. On appeal to Vice-Chancellor Proudfoot the master's report was affirmed, and on an appeal to the Court of Appeal for Ontario, it was held that the mortgage was *ultra vires*, and the master's report was affirmed.

Held, on appeal, reversing the judgment of the Court of Chancery, that the proviso in the mortgage was in its terms wide enough to sustain the contention of the mortgagee to claim the price of all the iron delivered on the wharf at Belleville, and that the memorandum endorsed by Brooks on the mortgage should not be construed as cutting down the terms of the proviso, but was intended as written evidence of Brooks' consent to the mortgage and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract.

Held, also, reversing the judgment of the Court of Appeal for Ontario, that the statutory power to borrow money and secure loans cannot be considered as implying that the company's powers to mortgage are to be limited to that object; and, therefore, that the mortgage executed by the company on a portion of their road in favour of the trustee Buchanan, being given within the scope of the powers conferred upon the company to "alienate, sell, or dispose" of lands for the purpose of constructing and working a railway, was not *ultra vires*.

Query—Whether the rights of a corporation to take lands, operating the railway, taking tolls, &c., are susceptible of alienation by mortgage in this country?

Held, also, that under the pleadings and decrees in the cause, the objection that the mortgage was *ultra vires* was not open to the company in the master's office, or on appeal from the master's report.

Bickford v. Grand Junction Railway Co.—i. 696.

2. *Railway crossing—Collision—Air-brakes—Failure to comply with Consolidated Statutes, c. 166. ss. 142, 143—Negligence—Damage.*

The Grand Trunk Railway crosses the Great Western Railway, about a mile east of the city of London, on a level crossing. On the 19th June, 1876,

Railways and Railway Companies—*Continued.*

a Grand Trunk train, on which plaintiff was on board as a conductor, before crossing, was brought to a stand. The signal-man who was in charge of the crossing, and in the employment of the Great Western Railway Company, dropped the semaphore, and thus authorized the Grand Trunk train to proceed, which it did. While crossing the track, appellant's train, which had not been stopped, owing to the accidental bursting of a tube in air-brakes, ran into the Grand Trunk train and injured plaintiff. It was shown that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes, in case of the air-brakes giving way. C. S. C., c. 66, s. 142, Rev. Stats. Ont., c. 165, s. 90, enacts that "every railway company shall station an officer at every point on their line crossed on the level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof, that the way is clear." S. 148 enacts that "every locomotive . . . or train of cars on any railway shall, before crossing the track of any other railway, on a level, be stopped for at least the space of three minutes."

Held, that the appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way. That there was no evidence of contributory negligence on the part of the Grand Trunk Railway, as they had brought their train to a full stop, and only proceeded to cross appellant's track when authorized to do so by the officer in charge of the semaphore, who was a servant of the Great Western Railway Company.

Great Western Railway v. Brown.—iii. 159.

3. Action by judgment creditor against holder of shares in.

See CORPORATIONS, 8.

4. Railway pass to voter.

See ELECTION, 17.

5. *Shipping note—Fraudulent receipt of Agent—Liability of Company.*

C., freight agent of respondents at Chatham, and a partner in the firm of B. & Co., caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favour of B. & Co., for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from B. & Co. the flour addressed to the appellants, and were attached to drafts drawn by B. & Co., and accepted by appellants. C. received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts,

Held, Fournier and Henry, JJ., dissenting, that the act of C. in issuing a false and fraudulent receipt for goods never delivered to the company, was not

Railways and Railway Companies—Continued.

an act done within the scope of his authority as the company's agent, and the company was therefore not liable.

Erb v. The Great Western Railway Co.—v. 179.

6. *Carriers—Railway Company, liability of as—Agreement—Additional parol term—Conditions—Wilful negligence—“At owner's risk.”*

The respondents sued the appellants' railway company for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial a verbal contract between plaintiffs and defendants' agent at I. was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was “that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk.”

Held, *per Ritchie, C.J.*, and Fournier and Henry, JJ., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers.

Per Strong, Fournier, Henry and Gwynne, JJ.—The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at L. was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in covered cars, and that non-compliance with the provision as to carriage in covered cars prevented the appellants setting up the condition that “oil was carried at the owner's risk” as exempting them from liability.

The Grand Trunk Railway Company of Canada v. Fitzgerald.—v. 204.

7. *Failure to sound whistle—Accident from horse taking fright—C. S. C. c. 66, s. 104—Finding of jury—Evidence.*

Held, affirming the judgment of the Court of Appeal for Ontario, that Consolidated Statutes of Canada, c. 68, s. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or, as in this case, by a horse being brought over near the crossing and taking fright at the appearance or noise of the train. The jury, in answer to the question, “If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?” said “Yes.”

Railways and Railway Companies—Continued.

Held, though the question was indefinite, the answers to the questions as a whole, viewed in connection with the judge's charge and the evidence, warranted the verdict.

Grand Trunk Railway v. Rosenberger.—ix. 811.

8. Agreement with Government—Breach of—Possession taken of road by Government.

See PETITION OF RIGHT, 15.

9. *Railway bonds—39 V. c. 57 (P.Q.), construction of—Condition precedent—Certificate of engineer, contents of—Parol evidence inadmissible—Onus probandi.*

The L. & K. Ry. Co. was incorporated in 1869 (82 V. c. 54 P.Q.), to construct a railway from Lévis to the frontier of the state of Maine, a distance of 90 miles. The Company was authorized by that Act to issue bonds or debentures to provide funds for the construction of the railway. In 1872, by 36 V. c. 45, (P.Q.), power was given to issue bonds to the amount of three million dollars without limitation of time, and without restriction as to the length of the railway constructed. In 1874, a statute of the Legislature of Quebec (37 V. c. 28), declared that debentures to the amount of \$280,000 had already been issued, and limited for the future the issuing of bonds to the amount of £300,000 stg., to be issued as follows:—The first issue of £100,000 at once; the second issue of £100,000 when 45 miles of the road should have been completed and in running order, as certified by the government inspecting engineer, and the third issue of £100,000 as soon as 30 additional miles—making in all 75 miles—should have been completed, with the same privilege for the three issues. In 1875 by the Act, 39 V. c. 57, the legislature amended the former Acts so as to modify the condition to be fulfilled by the L. & K. Ry. Co. before the third issue of £100,000 could be by them made. This condition was as enacted by the said Act, 39 V. c. 57, "so soon as the rails and fastenings required for the completion of the remaining forty-five miles or thereabouts of the company's line shall have been provided, then the remaining one thousand bonds of one hundred pounds each, to be termed the third issue, may be issued by the company." In that Act lastly cited, the preamble declared: "Whereas it appears that a total length of forty-five miles of the company's line having been completed, a first and second issue each of one hundred thousand pounds of the company's debentures have been made."

In March, 1881, the L. & K. railway was sold by the sheriff at the suit of the plaintiffs, the W. M. Co., and bought by the Q. C. R. Co., respondents, for \$195,000. In April, 1881, the corporation of the city of Quebec (appellants), filed an opposition *à fin de conserver* for \$218,099, being the amount of 800 debentures of £100 sterling and interest of the second issue issued on the 25th January, 1875, numbered 1020 and upwards, payable on the 1st January, 1894, and for the payment of which the opposants alleged that the said railroad was hypothecated. The Q. C. Ry. Co., also opposants in the case, contested the opposition of the corporation of the city of Quebec, and claimed the issue of the bonds of the second issue held by the appellants was illegal. At the trial

Railways and Railway Companies—*Continued.*

no certificate was produced, but the government engineer stated that he had reported to the Minister of Railways that there were only 48½ miles of the road completed, and the secretary of the company testified that the total length of railway certified by the government engineer as being completed and in running order had never exceeded 48½ miles. The learned judge, at the trial, found as a fact that there were only 48½ miles completed and held the bonds of the second issue invalid. This judgment was affirmed by the Court of Queen's Bench (appeal side).

On appeal to the Supreme Court, it was **Held**, reversing the judgment of the court below, that the effect of the statute, 39 V. c. 57, is to make the bonds therein mentioned good, valid and binding upon the company, although the conditions precedent specified in 37 V. c. 23, might not have been fulfilled when they were issued. Ritchie, C.J., and Strong, J., dissenting.

Per Fournier and Henry, JJ., that as there was evidence that a certificate or report had been given, oral evidence of the contents of the certificate or report was inadmissible and therefore respondents had failed to prove the illegality of the second issue.

Corporation of the City of Quebec v. Quebec Central Railway Co.—x. 563.

[The J. C. of the Privy Council allowed leave to appeal in this case, but the appeal was settled before argument].

10. Intercolonial railway.

See PETITION OF RIGHT, 1, 8.

11. Canadian Pacific Railway — Contract for Georgian Bay Branch of.

See PETITION OF RIGHT, 12.

12. Municipal by-law granting bonus to.

See BY-LAW, 8.

13. Appraisement of lands taken for railway—Order to set aside proceedings not appealable—Estoppel—Chapters 66 and 70, Act of 1869 (N.S.).

See JURISDICTION, 28.

14. *Negligence—Verdict—Motion for judgment on verdict and motion for new trial—Right of Court of Review as to—34 V. c. 4, s. 10, and 35 V. c. 6, s. 13 (P.Q.).*

The respondent (Wilson) obtained a verdict from a jury in the Superior Court District of Iberville, for injuries sustained by being run over on the 21st November, 1876, by a locomotive engine of the appellants, the G. T. R. Co., while he was crossing their railway track on a public highway at St. Johns, P.Q. The motion for judgment on the verdict was not made before the Superior Court District of Iberville, but was drawn up and placed on the

Railways and Railway Companies—*Continued.*

record while the case was pending before the Court of Review at Montreal. That court, on motion, directed a new trial, but the Court of Queen's Bench, on appeal, held that from the evidence in the record it appeared that the accident occurred through the gross negligence of the employees of the appellants in not ringing the bell and sounding the whistle, as they were bound to do, when approaching the crossing, and that the verdict rendered by the jury ought, therefore, to be maintained and the motion for a new trial rejected. See 2 Dorion's Q. B. R. 131.

On appeal to the Supreme Court of Canada, *Held*, Taschereau and Gwynne, JJ., dissenting, that the judgment of the Court of Queen's Bench should be affirmed.

Per Taschereau and Gwynne, JJ., dissenting.—The Superior Court, sitting in review at Montreal, has no jurisdiction, either under 34 V. c. 4, s. 10, or 35 V. c. 6, s. 13 (P.Q.) to determine a motion for judgment upon the verdict in a case tried in one of the rural judicial districts, and therefore the Court of Queen's Bench had no power to enter judgment for the respondents upon the verdict.

2. The Court of Review, on a motion for new trial in the first instance, having in its discretion granted same, judgment should not have been reversed on appeal.

Grand Trunk Railway Company v. Willson.—30th April, 1883.

15. *Intercolonial Railway—Negligence of conductor—Accident to passenger—Right of action—Contributory negligence.*

Plaintiff, having a first-class ticket from Sussex to Penobscuis by the Intercolonial Railway, intended going to Penobscuis (her home) by the mixed freight and passenger train, which was due to leave Sussex at 1.47 p.m. The train on that day was an unusually long one, and when the passenger cars were brought to the platform the engine was across the public highway. When the train came in it was brought up so that the forward part of the first-class car was opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was standing on the platform when the train came in, but did not then get aboard. The conductor of the train (the defendant) got off the train and went to a hotel for dinner. While he was absent the train was, without his knowledge, backed down, so that only the second-class car remained opposite the platform. The jury found that the first-class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after finishing his dinner, came over hastily (being behind time and therefore in somewhat of a hurry), called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track,) and almost immediately the train started.

The 124th regulation for government of the Intercolonial Railway prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which was not done in this

Railways and Railway Companies—*Continued.*

instance. Plaintiff and a lady friend, F., who was going by the same train were standing on the platform, and when they heard the call "all aboard," they went towards the cars as quickly as they could. F. got on all right, but plaintiff, who had a paper box in her hands, in attempting to get on board, caught the hand-rail of the car, when she slipped owing to the motion of the train and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board.

The Supreme Court of New Brunswick held, that although the plaintiff's contract was with the Crown, the defendant owed to her as a passenger a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury.

The facts will be found fully reported in 19 New Bruns. R., 8 Pugs. & Bur. 840, and 21 New Bruns. R. 586.

On appeal to the Supreme Court of Canada, Held, that the judgment of the court below should be affirmed. Taschereau and Gwynne, JJ., dissenting.

Per Ritchie, C.J.—There was no obligation on the part of the passengers to go on board the train until it was ready to start, or until invited to do so by the intimation from the conductor "all aboard." It was the duty of the conductor to have had his first-class car up in front of the platform. Should circumstances have prevented this, it was his duty to be careful before starting his train to see that sufficient time and opportunity were afforded passengers to board the car in the inconvenient position in which it was placed, and the evidence showed the defendant exercised no care in this respect.

Per Henry, J.—There was no satisfactory proof of contributory negligence on the part of the plaintiff. The package she carried was a light one, and such as is often carried by passengers with the knowledge and sanction of railway conductors and managers, and a tacit license is therefore given to passengers to carry such with them in the cars.

The plaintiff violated one of the regulations in attempting to get on the car while in motion. But the defendant could not shelter himself under those regulations, for when he gave the order "all aboard" he knew, or ought to have known, that the first-class car was away from the platform, and he ought to have advanced the train and stopped it, so that the plaintiff could have entered such car. The conductor was estopped from complaining that the plaintiff did what, by calling "all aboard," he invited her to do. After the notification "all aboard" is given by a conductor, it is his duty to wait a reasonable time for passengers to get to their places.

Per Taschereau and Gwynne, JJ., dissenting.—Whether the omission to stop the first-class car at the platform, or the not waiting a reasonable time after calling "all aboard" were or were not breaches of the defendant's duty, such breaches could not be said to have caused the accident if the plaintiff had not voluntarily attempted to get on the train while in motion, which she was not justified in doing.

Appeal dismissed with costs.

Hall v. McFadden.—1st May, 1883.

Railways and Railway Companies—*Continued.*

16. *Negligence—Damages—Fire communicated from premises of company—14 Geo. III. c. 78, s. 86, not applicable in cases of negligence.*

This was an action commenced by the respondent against the appellants for negligence on the part of the appellants in causing the destruction of the respondent's house and outbuildings by fire from one of their locomotives. The freight shed of the company was first ignited by sparks from one of the company's engines passing Chippawa station, and the fire extended to respondent's premises. The following questions, *inter alia*, were submitted to the jury, and the following answers given:—

Q. Was the fire occasioned by sparks from the locomotive? A. Yes.

Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes.

Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty.

Q. Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A. Out of order.

Verdict for plaintiff \$800.

On motion to set aside verdict, the Queen's Bench Division unanimously sustained the verdict.

On appeal to the Supreme Court, **Held**, affirming the judgment of the court below, Henry, J., dissenting, 1. That the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servant to sustain the finding.

2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.

3. The statute 14 Geo. III. c. 78, s. 86, which is an extension of 6 Anne c. 31, ss. 6 & 7, is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act, 31 Geo. III. c. 31, but has no application to protect a party from legal liability as a consequence of negligence.

Canada Southern Railway v. Phelps.—23rd June, 1884.—xiv. 132.

Railways and Railway Companies—Continued.

17. *Railway Company—Sparks from engine—Proper care to prevent emission of—Use of wood or coal for fuel—Contributory negligence.*

R. owned a barn situated about two hundred feet from the New Brunswick Railway Company's line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial, it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted, did not appear by their finding.

Held, reversing the judgment of the Supreme Court of the Province of New Brunswick, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial.

The New Brunswick Railway Co. v. Robinson.—23rd June, 1884.—xi. 688.

18. *Expropriation—Right of way—Cost of—Guarantee—By-law—Ultra vires—Injunction—44 & 45 V. c. 40, s. 2—Construction of.*

Under 44 & 45 V. c. 40, s. 2 (P.Q.) passed on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment of their charter, the town of Lévis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence River, over and above \$30,000. Appellants, being ratepayers of the town of Lévis, applied for and obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality. The proviso in s. 2 of the Act, under which the corporation of the town of Lévis contended that the by-law was authorized, is as follows: "Provided that within thirty days from the sanction of the present Act, the corporation of the town of Lévis furnishes the said company with its valid guarantee and obligation to pay all excess over \$30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the town of Lévis, no power or authority is given to the corporation to give such guarantee. The statute 44 & 45 V. c. 40 was passed on the 30th June, 1881; and the by-law forming the guarantee was passed on the 27th July following.

Held, reversing the judgment of the Court of Queen's Bench (L.C.), appeal side, and restoring the judgment of the Superior Court, that the statute in question did not authorize the corporation of Lévis to impose burdens upon the municipality which were not authorized either by their acts of incorpora-

Railways and Railway Companies—Continued.

tion or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained. (Ritchie, C.J., *dubitante*).

Quebec Warehouse Co. v. Levis.—12th Jan. 1885.—xi. 666.

19. *Contract for construction of railway—Agreement by company to deliver bonds—Assignment of right to receive bonds.*

On the 31st October, 1876, one A. entered into a contract with the Government of Nova Scotia for the construction of a railway from New Glasgow, N. S., to a point on the Strait of Canso, known as the Eastern Extension Railway. On the 20th of December, in the same year, A. assigned all his right to said contract to the appellants, and on the same day an agreement was entered into between the appellants and the Canada Improvement Company, whereby the latter undertook to build and equip the said Eastern Extension Railway. On 22nd December the respondent agreed with the Canada Improvement Company to do the necessary work on the said road, for which the company agreed to pay per mile the sum of \$4,800 in cash, and \$3,750 in first mortgage bonds of the respondent company. As security for his performance of the agreement, the respondent gave to the Canada Improvement Company a bond, with two sureties, in the penal sum of \$100,000, which bond was afterwards assigned to the Government of Nova Scotia.

The respondent proceeded with the work according to the said agreement, but the said bonds were not delivered as the work progressed, and the said Canada Improvement Company represented that they could not be issued at that time. The respondent, therefore, suspended the work and took proceedings against the Canada Improvement Company for breach of the said contract. These proceedings were settled by a payment to the respondent of a certain sum in cash and notes, and an agreement was entered into between the appellants of the first part; the Canada Improvement Company of the second part, and the respondent of the third part, which agreement, after reciting the above facts, provided *inter alia*, as follows:—

That the Canada Improvement Company would deliver to respondent \$80,000 of first mortgage bonds of appellant's company as soon as the same could be legally issued, and use every diligence to have them issued, and they should, so far as the parties of the first and second parts could make them, be a lien on the Truro and Pictou Branch Railway, which the Government of the Dominion were to hand over to the appellants, upon the Eastern Railway Extension and upon the appellant company and its property rights and privileges set forth in s. 92 of its Act of Incorporation.

That such bonds or other conveyances, or lien by which they might be secured, should be free from any clauses restraining a sale of the property to which such lien attached, or in any way impairing the remedy of the holders thereof in default of payment.

That the whole issue of the first mortgage bonds should not exceed \$1,250,000 and should bear interest at 6 per cent., and that no other security should take precedence of the bonds to be given to the respondent. But

Railways and Railway Companies—*Continued.*

provision might be made for giving clear titles of the company's bonds in the event of their being sold, the proceeds to be secured for the benefit of the bondholders.

That the appellants covenanted and guaranteed that the bonds would be delivered to respondent as above set out, and that they would, if necessary, endeavour to procure such legislation as would remedy any defects now existing in their organization.

That the Government of Nova Scotia would use all means within its power to enforce the delivery of such bonds and might refuse government aid to said companies, until satisfied that respondent's right to receive the said bonds was protected and assured.

That the contract between the Canada Improvement Company and the respondent should be cancelled, and the bond given by respondent delivered up to him.

On or about the first day of February, 1879, the appellants entered into an agreement with the Governments of the Dominion and of Nova Scotia relinquishing their rights to the "Pictou Branch Railway," mentioned in said agreement, and agreed to the repeal of the Act providing for the transfer of the same to the appellants, and that it should be retained by the Dominion until the Eastern Extension Railway to the Strait of Canso and the steam ferry across the strait should be completed, and then transferred to the appellants on certain conditions.

This the respondent claimed to be a breach of the above agreement, and brought an action against the appellants and the Canada Improvement Company, the latter, however, not being served with the writ issued in the cause.

The defendants pleaded, *inter alia*, that as to \$40,000 of the said bonds the plaintiff had given an order on the Canada Improvement Company for the delivery of the same to the Hon. P. C. Hill, Provincial Secretary of Nova Scotia, which order had been accepted by the company, and was, in effect, an assignment of that portion of the said bonds. The evidence of the plaintiff on the trial, in regard to such order, was that it was given on the condition that an order in council should be passed by the Nova Scotia Government protecting the right of the said plaintiff to have the said bonds delivered to him, and the bonds given to the Canada Improvement Company, as security for the due performance by the plaintiff of the work on the Eastern Extension Railway, delivered up to the plaintiff; and on these conditions being fulfilled the plaintiff was to give to the Government a formal assignment of the said mortgage bonds to the extent of \$40,000, but that such conditions were never carried out.

The plaintiff recovered in the action, and the verdict in his favour was affirmed by the Supreme Court of Nova Scotia, whereupon the defendants in the action appealed to the Supreme Court of Canada, and, on the argument of the last mentioned appeal an agreement was entered into between the parties, to which agreement the Government of Nova Scotia became a party, empowering the court to decide the case on the merits irrespective of the pleadings

Railways and Railway Companies—Continued.

or any technical defence raised thereon, and limiting the amount in question to the sum of \$40,000, the balance being satisfied by a judgment recovered by the respondent against the Canada Improvement Company, in the Province of Quebec.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the agreement entered into by the appellants with the governments of the Dominion and the Province of Nova Scotia, was a breach of the agreement made between the appellants, the Canada Improvement Company, and the respondent, above in part recited.

Held, also, that the order given to the Honourable P. C. Hill, was given on certain conditions which were never carried out, and was not an assignment of the bonds therein mentioned, and therefore the respondent was entitled to recover the said sum of \$40,000, with interest from the date of the breach of the said agreement.

Appeal dismissed with costs.

[An application was made in this case to the Judicial Committee of the Privy Council for leave to appeal. The application was refused with costs. Their lordships considered that in deciding the case under the agreement entered into at the hearing of the appeal, the Supreme Court was not acting in its ordinary jurisdiction as a court of appeal, but was acting under the special reference made to it under this agreement. Further, their lordships thought that even if it were open to them to give leave to appeal, the questions raised were not of sufficient public interest to induce them to depart from the ordinary rule that persons who have gone to the Supreme Court of Canada, and have there failed, shall not proceed any further to her Majesty in Council.—3rd April, 1886. *Gregory v. Attorney-General of N. S.* 11 App. Cases, 229.]

The Halifax & Cape Breton Coal & Ry. Co. v. Gregory.—16th February, 1885.

20. Arbitration under 44 V. c. 43, (Q.).

See ARBITRATION AND AWARD, 8.

21. *Negligence—Post with notice to engine drivers to stop before approaching bridge—“Res ipsa loquitur”—Damages—New trial—Non-suit.*

An action by plaintiff to recover damages for personal injuries sustained by being thrown out of his waggon, on a highway, in the city of Winnipeg, called Bridge Street, at that part where it approaches the Louise Bridge, owing to his horses becoming frightened at an engine and train which had advanced to the bridge, and immediately alongside the public highway approach to the bridge. After taking fright, the horses became unmanageable and ran away, throwing the respondent out, and on to a pile of stones on the highway.

The declaration alleged that there was a post some distance from the bridge and down the railway track, having the sign “stop” painted on it, and that it was the duty of the defendants to stop the engine at this sign, unless

Railways and Railway Companies—Continued.

the bridge caretaker signalled that the line was clear. That on the occasion complained of, the engine came down to the bridge before stopping.

The declaration then charged the defendants with neglecting and refusing to stop at the said sign, and with neglecting and refusing to obey the flag signals of the bridge caretaker: and that the defendants "so negligently, unskilfully and improperly managed the said engine and train that they allowed the same to proceed towards and up to the said bridge, and immediately alongside the aforesaid public highway approach thereto, and caused and permitted steam to escape from the said engine with a loud noise, whereby, and by reason of the said negligent, unskilful and improper conduct of the said servants of the defendants, and by reason of the close approach of the said engine and train, and by reason of the escape of the said steam;" the horses, etc., became frightened, while turning out of the said bridge into the highway, and while upon the highway approach to the bridge the horses ran away, and the plaintiff was unable to control or manage them, and he was thrown from the waggon, etc., etc.

A demurrer was filed to this declaration on the ground that it contained an allegation of duty which was a conclusion of law, and the declaration did not show a violation on the part of the defendants of any common law duty, or statutory obligation.

The cause was tried before Wallbridge, C.J., Manitoba.

After the plaintiffs case was closed, a motion for non-suit was made.

His Lordship declined to non-suit, but gave leave to defendants to move on the whole case.

Witnesses were then called for the defence, and the jury gave a verdict for plaintiff for \$750.

In Easter term, 1888, a rule *nisi* was taken out, to set aside the verdict and enter a non-suit, or for a new trial.

The demurrer was overruled, on the ground that the allegations pointed to in the demurrer did not stand alone, but other and sufficient causes were shown to impose upon the defendants that care and regard for the safety of the public from injury by their acts, the absence of which care and regard, constituted with the wrongful acts charged, the cause of action of which the plaintiff complained.

The rule *nisi* was discharged, so far as it asked for a non-suit, but was made absolute for a new trial.

On appeal to the Supreme Court of Canada, Held, that the plaintiff was entitled to recover, but not having appealed from the rule ordering a new trial, that rule should be affirmed and the appeal dismissed with costs.

Per Ritchie, C.J.—The evidence showed that there was a man employed to watch the bridge, whose duty it was to signal trains crossing, and that he was there and discharged his duty. It was also shewn that the company had posts erected on the line approaching the bridge, put there for the purpose of indicating that the engines should stop there before approaching the bridge, to give the signal to enable them to cross the bridge in safety; but, instead of stopping there, on the occasion in question, the train went on and approached within a

Railways and Railway Companies—*Continued.*

very few yards of the bridge and stopped, when those persons who were crossing the bridge were compelled to come immediately alongside, and within a few feet of the engine. The engine being there and blowing off steam, the horses of the plaintiff became frightened and ran away, causing the damages claimed. The accident was occasioned solely through negligence on the part of the defendants. If the engine had stopped at the indicated stopping place, the evidence showed that the accident would not have happened. Running it down as close as possible to where the carriages had to cross the bridge was a piece of recklessness. There was no contributory negligence on the part of the plaintiff; no neglect or want of care on his part, as he had a right to cross the bridge at the time, and under the circumstances could not be anywhere else than where he was.

Per Strong, J.—The case appears one in which the maxim "*res ipsa loquitur*" applies. The defendants by putting the post with a printed sign board on it, with a direction to engine drivers not to pass it, as indicating the point beyond which it was not safe to proceed until it was ascertained that the bridge was clear, by their own act had shown that the omission to obey this direction would be negligence.

Per Henry, J.—The mere fact that the post was established by arrangement between the city and railway authorities for engines to stop at, made the company liable for breaking the rule, there being no contributory negligence on the part of the plaintiff.

Appeal dismissed with costs.

Canadian Pacific Railway Co. v. Lawson.—12th May, 1886.

22. Use of streets of city of Quebec by North Shore Railway Company—Non-liability of corporation for damages caused by.

See CORPORATIONS, 21.

23. *Street railway—Accident—Action of damages for—Improper construction of track—Finding of court of first instance on the evidence affirmed.*

The plaintiff, a driver employed by the Montreal Brewing Company, while crossing the track of the defendants on Place d' Armes, opposite the church of Notre Dame, was thrown out of the waggon which he was driving by the breaking of the rear axle, breaking his leg and sustaining other severe injuries. He brought an action of damages alleging that the accident had occurred by the fault of the defendants, owing to the improper construction and bad order of the track.

The Superior Court for Lower Canada (Torrance, J.) found that the track was in bad order, the switch being three inches above the level of the road, contrary to law, and that this caused the accident without any fault on the part of the plaintiff, whose damages he assessed at \$2,500. The Court of Queen's Bench for Lower Canada (appeal side) reversed this judgment, being of opinion that the rails, as well as the part of the roadway the defendants were bound to maintain, were lawful and sufficient; that the defendants were

Railways and Railway Companies—Continued.

not in fault, and that the plaintiff had not exercised the necessary caution and prudence to which he was bound, and might, by the exercise of reasonable caution and prudence, have avoided the accident.

On appeal to the Supreme Court of Canada, **Held**, that the questions to be decided were purely matters of fact, and the judgment of the court of first instance should not have been disturbed. Strong, J., dissenting, on the ground that the judgment of the Court of Queen's Bench on the facts was correct.

Appeal allowed with costs.

Parker v. Montreal City Passenger Railway Company.—22rd June, 1885.

[In this case the Judicial Committee of the Privy Council refused leave to appeal].

24. Negligence—Death of wife by—Damages to husband as administrator—Benefit of children—Loss of household services—Care and training of children.

Held, affirming the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 1), that although on the death of a wife, caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services, accustomed to be performed by the wife, which would have to be replaced by hired services, may be a substantial loss for which damages may be recovered, and so also may be the loss to the children of the care and moral training of their mother.

[In this case the Judicial Committee of the Privy Council refused leave to appeal; see *Canadian Gazette*, vol. 6, p. 583.]

St. Lawrence & Ottawa Ry. Co. v. Lett.—xi. 422.

25. Railway Company—Carriage by railway—Special contract—Negligence—Liability for—Power of Company to protect itself from—Live stock at owner's risk—Railway Act, 1868, 31 V. c. 68, s. 20, s-s. 4—34 V. c. 43, s. 5—42 V. c. 9.

A dealer in horses hired a car from the Grand Trunk Railway Company for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other conditions:—

"The owner of animals undertakes all risks of loss, injury, damage and other contingencies, in loading, etc.

"3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes, . . . the person using any such pass takes all risks of every kind, no matter how caused."

The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip.

Railways and Railway Companies—*Continued.*

Through the negligence of the company's servants a collision occurred by which the said horses were injured.

On appeal from the Court of Appeal for Ontario, 10 Ont. App. R. 162, affirming the judgment of the Divisional Court, 2 Ont. R. 197, in favour of the defendants, *Held, per Ritchie, C.J., and Fournier and Henry, JJ.,* that under the General Railway Act, 1868, 31 V. c. 68, s. 20, s-s. 4, as amended by 34 V. c. 48, s. 5, re-enacted by Consol. Ry. Act, 1879, 42 V. c. 9, s. 25, s-as. 2, 3, 4, which prohibits railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the Grand Trunk Railway Company, the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.

Per Strong and Taschereau, JJ.—That the words "notice, condition or declaration," in the said statute contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

Grand Trunk Ry. Co. v. Vogel. }
Grand Trunk Ry. Co. v. Morton. } —xi. 612.

26. *Accident—Damages—Negligence—Wharf insufficiently lighted—No gate or chain—Ferry.*

The respondent, plaintiff, alleged in her declaration that, on or about the 29th October, 1883, her husband, Louis Hésique Fournier, upon whose labour she and her eleven children were dependent for their support, was drowned at the Grand Trunk wharf, in the city of Quebec; that the appellant company was the cause of his death by its gross negligence and culpable and malicious imprudence and want of forethought ("par sa négligence grossière, son imprudence et imprévoyance coupable et malicieuse;") that the company was bound by law to keep its wharves, pontoons, etc., in good order; to put railings, guards and gates, and lights sufficient to ensure the safety of its passengers, and to light in a proper manner its wharves and pontoons, whenever necessary, all which it had failed to do for four or five months previous to the 29th October, 1883; that on that day the weather was rainy and very dark; that the husband of the plaintiff having purchased a ticket to cross on the appellant's ferry boat, went down to its wharf to take the steamer which was advertised to leave at 6.15 p.m.; that by reason of the imprudence and malicious and culpable negligence of the company, its wharf and pontoon were insufficiently lighted, and were in a dangerous and slippery condition, and not provided with doors, guards or gates, and that the ferry boat was not at the wharf, notwithstanding that the hour of its arrival had passed; that her husband, while proceeding to take the ferry, which he believed to be at the wharf, without negligence and imprudence on his part, and notwithstanding that he took all possible precautions, but by reason of the want of light, and the absence of guards or gates, fell over the wharf and was drowned; and she prayed for a condemnation for \$5,000.

A perusal of the declaration establishes that the plaintiff relied upon charges of general negligence on the part of the company, and upon specific

Railways and Railway Companies—*Continued.*

omissions: 1st. Insufficiency of light. 2nd. Want of gates, guards or railings. 3rd. The late arrival of the ferry boat.

To this action the appellants pleaded the general issue, thus negating the allegations of care and prudence on the part of the plaintiff's husband, and of negligence, general or special, on its own part.

The company's premises consist of a large wharf, upon which the offices, etc., are built, and a double pontoon, necessary by reason of the great rise and fall of the tide, to the outer one of which the ferry boat moors. The pontoons are reached by a slip in the wharf. Upon the outer pontoon is built a large freight shed, through which a passage about twelve feet wide by thirty feet long leads to the river, and by means of which the ferry boat is reached.

The deceased Hésique Fournier, on his way home, at about 6 o'clock in the evening, came to the Grand Trunk ferry; he crossed diagonally the first pontoon and had to enter the narrow corridor or passage-way on the covered pontoon, at the end of which passage he expected to find the steamboat ferry already moored and prepared to receive passengers on board. The end of this passage is closed by a door or gate sliding on rollers, which is usually kept shut for the safety of freight, and for preventing rain or snow from coming in. This door was not then closed. The deceased walked through this passage-way to get on board the ferry boat (which was late that evening), and the night being dark and foggy, and the passage lighted with only one lamp, he walked or slipped into the water and was drowned.

After a lengthy trial, in which the main point urged by the plaintiff was the pretended insufficiency of the lights, the judge who heard the case found that the death of the plaintiff's husband was solely due to his own gross negligence, want of care and prudence, and that the accident could not have happened had he exercised ordinary care and prudence, and dismissed the action.

This judgment was reversed on appeal to the Court of Queen's Bench for the Province of Quebec (Mr. Justice Cross dissenting), the court holding that the accident had been occasioned by the negligence and want of due care of the company, and not to any fault or negligence on the part of Fournier, and adjudged \$1,000 to the plaintiff.

On appeal to the Supreme Court of Canada, Held, affirming the judgment of the Court of Queen's Bench, that the evidence showed culpable negligence on the part of the railway company in not having sufficient lights, and in not having a gate or chain to guard against accidents. The damages would not be increased, but interest should be allowed on the amount awarded by the Queen's Bench from the time of the demand.

Appeal dismissed with costs.

Grand Trunk Ry. Co. v. Boulanger.—17th March, 1886.

27. Agreement by municipal corporation to take stock in railway and to pay for same in debentures—Breach of agreement—Right of railway company to sue for special damages.

See DAMAGES, 40.

Railways and Railway Companies—Continued.**28. Costs of arbitration under Consolidated Railway Act, 1879.***See COSTS, 3.***29. Farm crossing—Liability of Railway Company to provide—
Agreement with agent of company—14 & 15 V. c. 51, s. 13
—Substitution of "at" for "and" in Consolidated Statutes
of Canada, c. 66, s. 13.**

The C. S. R. Co. having taken for the purposes of their railway the lands of C., made a verbal agreement with C., through their agent T., for the purchase of such lands, for which they agreed to pay \$662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid. The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction.

Held, reversing the judgment of the court below, Ritchie, C.J., dissenting, that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm.

Held, also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the master of the court below.

The substitution of the word "at," in s. 13 of c. 66 of the Consolidated Statutes of Canada, for the word "and" in s. 13 of c. 51 of 14 & 15 V. is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect. *Brown v. The Toronto and Nipissing Ry. Co.* (26 U. C. C. P. 206) overruled.

Railways and Railway Companies—Continued.

30. Farm crossing—Under crossing—Agreement for cattle pass— Trestle bridge, right to substitute embankment for.

This case differs from that of *Clouse v. The Canada Southern Ry. Co.* (see *Railways and Railway Companies* 29,) in this that an agreement was reduced to writing to the effect that S., through whom the plaintiff claimed, should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow of the passage of cattle, the company will so construct their fence to each side thereof as not to impede the passage thereunder."

Held, reversing the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 806), Ritchie, C.J., dissenting, that the agreement provided for a passage for cattle only, and that conditional upon there being a trestle bridge of sufficient height to permit of such a passage, and did not make the right of the company to discontinue the trestle bridge and erect an embankment subject to the construction of a cattle pass in the embankment or a re-valuation of the land. The plaintiff's statement of claim should be dismissed with costs, but such dismissal would not operate against any claim which he might have under the law for such farm crossings as might be necessary for the reasonable enjoyment of the severed lands.

Appeal allowed with costs.

Canada Southern Ry. Co. v. Erwin.—9th April, 1886—xiii. 162.

31. Agreement with municipality for construction of subway— Order in Council under 46 V. c. 24 (D.)—Work done by municipality as agent of companies or as principal—Injury to property by construction of subway—Corporation a wrongdoer.

See MUNICIPAL CORPORATION, 6.

32. Bonus to—Action against municipality for—Illegal by-law granting bonus.

See MUNICIPAL CORPORATION, 7.

33. Cons. Railway Act 1879, 42 V. c. 9—Application of, to special Act—Canadian Pacific Railway Incorporation Act, 44 V. c. 1—Powers of company under—Right to build line beyond terminus.

Held, Henry, J., dissenting, that the Canadian Pacific Railway Company have power, under their charter, to extend their line from Port Moody, in British Columbia, to English Bay.

Canadian Pacific Ry. Co. v. Major.—xiii. 233.

Railways and Railway Companies—Continued.

34. Certificate of engineer—Failure to procure in reasonable time.

See CONTRACT, 28.

35. Damages—Misdirection as to solatium—New trial—Art. 1056, C. C.

See DAMAGES, 45.

36. Sale of railway shares *en bloc*—Arts. 595, 599, C. C.

See EXECUTION, 8.

37. Navigable river—Access to by riparian owner—Obstruction by railway company—Damages—Action at law—43-44 V. (P.Q.), c. 43, s. 7, s-ss. 3 & 5.

See RIPARIAN PROPRIETORS, 2.

38. Municipal debentures—Compliance by railway company with conditions precedent to their issue—Debentures to be free on their face from future conditions—Municipal Code, (P.Q.), Art. 982.

See CORPORATIONS, 33.

39. *Contract for hire—Agreement to purchase railway—Rolling stock—Appeal—Arbitration and award.—R. S. O. c. 50, s. 189.*

B., the contractor for building the E. & H. Railway, and, practically, the owner thereof, negotiated with the solicitor of the C. S. R. for the sale to the latter of the E. & H. Railway when built. While the negotiations were pending B. went to California, and the agents who looked after the affairs of the E. & H. Railway in his absence applied to the manager of the C. S. R. for some rolling stock to assist in its construction. The manager of the C. S. R. was willing to supply the rolling stock on execution of the agreement for sale of the road which was communicated to B., who wrote a letter to the manager in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars and any other assistance or advantage you may have given Mr. Farquier (the agent)."

The negotiations for the purchase of B.'s railway by the C. S. R. having fallen through, an action was brought by the latter company against B. and the E. & H. Railway for the hire of the rolling stock which was resisted by B. on two grounds, one that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs, which had fallen through by no fault of B. and the other, that if the plaintiffs had any right of action it was only against the E. & H. Railway and not against him.

By consent of the parties the matter was referred to the arbitration of a County Court Judge, with a provision in the submission that the proceedings

Railways and Railway Companies—Continued.

should be the same as on a reference by order of the court, and that there should be a right of appeal from the award as under R. S. O. c. 50, s. 189.

The arbitrator gave an award in favour of the plaintiffs; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits but upheld the award. The defendants then appealed to the Supreme Court of Canada.

Held, affirming the judgment of the Court of Appeal that the arbitrator was justified in awarding the amount he did to the plaintiffs, and that B. as well as the company was liable therefor.

Bickford v. Canada Southern Ry. Co.—14th June, 1888.—xiv. 743.

40. Sparks from engine—Lapse of time before discovery of fire—Presumption as to cause of fire—Defective engine—Negligence—Examination for discovery—Officers of Corporation—R. S. O. (1877) c. 50, s. 136.

A train of the Canada Atlantic Railway Company passed the plaintiff's farm about 10.30 a.m., and another train passed about noon. Some time after the second train passed it was discovered that the timber and wood on plaintiff's land was on fire, which fire spread rapidly after being discovered and destroyed a quantity of the standing timber on said land. In an action against the company it was shown that the engine which passed at 10.30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous.

Held, affirming the judgment of the Court of Appeal, that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed.

Held also, Henry, J., dissenting, that the locomotive superintendent and locomotive foreman of a railway company are "officers of the corporation" who may be examined as provided in R. S. O. (1877) c. 50, s. 136, and the evidence of such officers as to the conditions of the respective engines and the difference as to danger from fire between a wood-burning and a coal-burning engine, taken under said section, was properly admitted on the trial of this cause; and certain books of the company containing statements of repairs required, on these engines among others, were also properly admitted in evidence without calling the persons by whom the entries were made.

Canada Atlantic Ry. Co. v. Moxley.—xv. 145.

Railways and Railway Companies—Continued.

41. Street railway—By-law and agreement as to construction and assumption of ownership by corporation upon giving notice—Arbitration—Appointment of arbitrator by court.

See CORPORATIONS, 39.

42. *Railway—Aid to—By-law granting bonus—Conditions of prior agreement—Performance of conditions—Specific performance—Damages.*

By an agreement between the E. & H. Railway Co. and the town of C. the latter agreed to pass a by-law granting a bonus to the company to aid in the construction of a railway, subject to the performance of certain specified conditions. The by-law subsequently approved by the ratepayers, and passed by the council of the town, did not contain all the conditions of the agreement. In an action against the town to compel the delivery of debentures for the amount of the bonus the defendants pleaded non-performance of the conditions of the agreement as justifying the withholding of the debentures and by way of counter-claim, prayed specific performance of such conditions by the plaintiffs.

Held, 1. *Per* Ritchie, C.J., Strong, Fournier and Henry, JJ.—Taschereau and Gwynne, JJ., *contra*—that the title to the debentures did not depend upon prior performance of conditions in the agreement not included in the by-law, but upon performance of those in the by-law alone, and the latter having been complied with, the debentures should issue.

2. *Per* Fournier, J., that the debentures should, nevertheless, be withheld until the damages for non-performance of the conditions in the agreement were paid or secured.

3. *Per* Ritchie, C.J., Strong and Henry, JJ.—Fournier, J., *contra*—that specific performance was not an appropriate remedy in such a case and the defendants could only claim damages for non-performance.

4. *Per* Ritchie, C.J., Strong and Fournier, JJ., that the claim of defendants for damages could be disposed of in this action under the counterclaim and there should be a reference to assess the same.

5. *Per* Henry, J., that the evidence did not justify a reference and the counterclaim should be dismissed with a reservation of defendant's rights.

One of the conditions in the agreement to be performed by the railway company was "to construct at or near the corner of Colborne and William streets (in Toronto) a freight and passenger station, with all necessary accommodation, connected by switches, sidings or otherwise, with the said road" upon the council of the town passing a by-law granting the necessary right of way.

Held, 1. That such condition was not complied with by the erection of a station building not used, nor intended to be used, and for which proper officers, such as a station-master, ticket agent, etc., were not appointed. Strong, J., dissenting.

Railways and Railway Companies—*Continued.*

2. *Per Strong, J.*, that the condition only called for the construction of a building with the required accommodation and connections, and did not amount to a covenant to run the trains to such station or make any such use of it.

3. The words "all necessary accommodation" in the condition required that grounds and yards sufficient for freight and passenger traffic in case the station were used should be provided.

The Act incorporating the railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act.

Held, that such special Act was not restrictive of the Municipal Act, and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus.

Held also, that all defects of form in the by-law were cured by 44 V. c. 24, s. 28, providing for registry of by-laws and requiring an application to quash to be made within three months after such registry.

Bickford v. Corporation of Chatham.—xvi. 235.

[Leave to appeal in this case was refused by the Privy Council. See *Canadian Gazette*, Vol. XIV., p. 158.]

43. *Railway company—Carriage of goods—Contract for—Carriage beyond terminus of line—Exemption from liability—Construction of contract—Statutory liability—Joint tortfeasors—Release to one—Effects of.*

Where a railway company undertakes to carry goods to a point beyond the terminus of its own line its contract is for carriage of the goods over the whole transit, and the other companies over whose lines they must pass are merely agents of the contracting company for such carriage, and in no privity of contract with the shipper. *Bristol & Exeter Railway Co. v. Collins* (7 H. L. Cas. 194) followed.

Such a contract being one which a railway company might refuse to enter into, s. 104 of the Railway Act, R. S. C. c. 109, does not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they had left its own line. The decision in *Vogel v. G. T. R. Co.* 11 Can. S. C. R. 612, does not govern such a contract.

One of the conditions in a contract by the G. T. R. Co. to carry goods from Toronto to Portage la Prairie, Man., a place beyond the terminus of their line, provided that the company "should not be responsible for any loss, mis-delivery, damage or detention that might happen to goods sent by them, if such loss, mis-delivery, damage, or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits."

Held, that this condition would not relieve the company from liability for loss or damage occurring during the transit even if such loss occurred beyond the limits of the company's own line.

Railways and Railway Companies—*Continued.*

Held, per Strong and Taschereau, JJ., that the loss having occurred after the transit was over, and the goods delivered at Portage la Prairie, and the liability of the company as carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line Portage la Prairie was situate, as bailees for the shipper. Fournier and Gwynne, JJ., dissenting.

Another condition of the contract provided that no claim for damage to, loss of, or detention of goods should be allowed unless notice in writing, with particulars, was given to the station agent at or nearest to the place of delivery within thirty-six hours after delivery of the goods in respect to which the claim was made.

Held, per Strong, J., that a plea setting up non-compliance with this condition having been demurred to, and the plaintiff not having appealed against a judgment overruling the demurrer, the question as to the sufficiency in law of the defence was *res judicata*.

Held, also, per Strong, J., Gwynne, J., contra, that part of the consignment having been lost, such notice must be given in respect to the same within thirty-six hours after the delivery of those which arrive safely.

Quære—In the present state of the law is a release to, or satisfaction from, one of several joint tort-feasors, a bar to an action against the others?

G. T. Ry. Co. v. McMillan.—xvi. 543.

[In this case application was made to the Judicial Committee of the Privy Council for leave to appeal, but was refused on the ground that the case admittedly did not affect property of considerable amount, nor could it well be described as being of a very substantial character, the sum at stake being reduced to something under £250, *stg.*; and the judgment of the Supreme Court did not determine a question of great public interest, or an important question of law. *Gagnon v. Prince*, 8 App. Cases, 103, approved. May 17th, 1889].

44. *Expropriation of land—Abandonment of notice—Enforcing award—Possession—R. S. C. c. 109, s. 18, s-s. 26 & 31.*

Held, per Gwynne and Patterson, JJ., that an abandonment of a notice to take lands for railway purposes, under R. S. C. c. 109, s. 8, s-s. 26, must take place while the notice is still a notice and before the intention has been exercised by taking the lands. That the proper mode of enforcing an award of compensation, made under the Railway Act, is by an order from the judge.

Quære.—Whether s-s. 31 of s. 8, c. 109, R. S. C. permits possession to be given before the price is fixed and paid of any land, except land on which some work of construction is to be at once proceeded with.

Canadian Pacific Railway Co. v. St. Therese.—xvi. 606.

Railways and Railway Companies—Continued.

45. Action of damages for railway accident—Death of plaintiff—
Abatement of action—*Actio personalis moritur cum persona*—Lord Campbell's Act.

See ACTION, 5.

46. *Railway company—Negligence—Death caused by—Running through town—Contributory negligence—Insurance on life of deceased—Reduction of damages for.*

In an action against the G. T. R. Co. for causing the death of the plaintiff's husband by negligence of their servants, it was proved that the accident occurred while the train was passing through the town of Strathroy; that it was going at a rate of over thirty miles an hour; and that no bell was rung or whistle sounded until a few seconds before the accident.

Held, affirming the judgment of the Court of Appeal, 13 Ont. App. R. 174, that the company was liable in damages.

For the defence it was shown that the deceased was driving slowly across the track with his head down and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching when he whipped up his horses and endeavoured to drive across the track and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view. The jury found that there was no contributory negligence.

Held, *per* Ritchie, C.J., and Fournier and Henry, JJ., that the finding of the jury should not be disturbed. Strong, Taschereau and Gwynne, JJ., *contra*.

The life of the deceased was insured, and on the trial the learned judge deducted the amount of the insurance from the damages assessed. The Divisional Court overruled this, and directed the verdict to stand for the full amount found by the jury. This was affirmed by the Court of Appeal.

Held, that the judgment in this respect should be affirmed.

Present: Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

The Grand Trunk Ry. Co. v. Beckett.—June 20, 1887.—xvi. 713.

[Leave to appeal was refused by the J. C. of the P. C. See *The Grand Trunk Railway Co. of Canada v. Jennings*, 13 App. Cases 800, in which this case was discussed and approved].

47. Expropriation of land for railway purposes—Estimation of damages—R. S. C. c. 39, s. 3, s-s (e)—Farm crossings—R. S. C. c. 38, s. 16.

See EXPROPRIATION, 8.

Railways and Railway Companies—Continued.**48. Expropriation of land for railway purposes—Severance of land—Farm Crossings—Compensation.**

See EXPROPRIATION, 9.

49. Negligence—Approaching siding—Notice of approach.

At a place which was not a station nor a highway crossing, the N. B. Ry. Co. had a siding for loading lumber delivered from a saw mill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber when a train coming out of a cutting frightened the horses, which dragged the deceased to the main track where he was killed by the train.

Held, that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding.

New Brunswick Railway Co. v. Yanwart.—xvii. 85.

50. Railway company—Negligence—Accident to employee—Performance of duty—Contributory negligence.

J., a switch-tender of the C. S. Ry. Co., was obliged in the ordinary discharge of his duty to cross a track in the station yard to get to a switch and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care.

Held, that the Workmen's Compensation for Injuries Act of Ontario, 49 V. c. 28, applies to the C. S. Ry. Co., notwithstanding it has been brought under the operation of the Government Railways Act of the Dominion.

Held, also, Gwynne and Patterson, JJ., dissenting, that there was no such negligence on J's. part as would relieve the company from liability for the injury caused by improper conduct of their servants and the judgment of the court below sustaining a verdict for the plaintiff was right, therefore, and should be affirmed.

The Canada Southern Ry. Co. v. Jackson.—xvii. 316.

51. Expropriation for railway purposes—Award—Validity of—Riparian rights—Obstruction to *accès et sortie*—Right of action.

See EXPROPRIATION, 10.

52. Municipal aid to railway company—Debentures signed by warden *de facto*—44-45 V. c. 2, s. 19 (P.Q.)—Completion of railway—Evidence of—*Onus probandi* on defendant.

A municipal corporation, under the authority of a by-law, issued and handed to the treasurer of the Province of Quebec \$50,000 of its debentures

Railways and Railway Companies—Continued.

as a subsidy to a railway company, the same to be paid over to the company in the manner (and subject to the same conditions) in which the Government provincial subsidy was payable under 44-45 V. c. 2, s. 19 (P.Q.) viz., "when the road was completed and in good running order to the satisfaction of the Lieutenant-Governor in Council."

The debentures were signed by S. M. who was elected warden and took and held possession of the office after the former warden had verbally resigned the position.

In an action brought by the railway company to recover from the treasurer of the Province the \$50,000 debentures after the Government bonus had been paid and in which action the municipal corporation was *mise en cause* as a co-defendant, the provincial treasurer pleaded by demurrer only, which was overruled, and the County of Pontiac pleaded general denial and that the debentures were illegally signed.

Held, 1st. Affirming the judgment of the court below, that the debentures signed by the Warden *de facto* were perfectly legal.

2nd. That as the provincial treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieutenant-Governor in Council the onus was on the municipal corporation, *mise en cause*, to prove that the Government had not acted in conformity with the statute. Strong, J., dissenting.

Corporation of the County of Pontiac v. Ross.—xvii. 406.

53. Damages caused by sparks from locomotive—Responsibility of company—R. S. C. c. 109 s. 27—51 V. c. 29, s. 287—Limitation of actions for damages.

Running a train too heavily laden on an up-grade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railway track, was set on fire and destroyed.

Held, affirming the judgments of the courts below, that there was sufficient evidence of negligence to make the company liable for the damage caused by the fire.

Per Gwynne, J., that the "damage" referred to in s. 27, of c. 109, R. S. C., and s. 287 of 51 V. c. 29, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present.

North Shore Ry. Co. v. McWillie.—xvii. 511.

54. Railway company—Expropriation of land—Description in map or plan filed—42 V. c. 9.

A company built its line to the termini mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired, but the company had terminated the representation on the board of directors which, by statute, was to

Railways and Railway Companies—Continued.

continue during construction and had claimed and obtained from the city of K. exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute.

Held, affirming the judgment of the court below, that the statutory provisions that land required for a railway shall be indicated on a map or plan filed in the Department of Railways before it can be expropriated applies as well to a deviation from the original line as to the line itself, and the company, having failed to show any statutory authority therefor, could not take the said land against the owner's consent.

Held, also, that the proposed extensions was not a deviation within the meaning of the statute, 42 V. c. 9, s. 8, s-s. 11 (D.).

Per Ritchie, C.J., Strong, Fournier and Taschereau, JJ., that the road authorized was completed as shown by the acts of the company, and upon such completion the compulsory power to expropriate ceased.

Per Gwynne, J., that the time limited by the charter for the completion of the road not having expired the company could still file a map or plan showing the lands in question, and acquire the land under s. 7, s-s. 19 of the Act, 42 V. c. 9.

Kingston and Pembroke Ry. Co. v. Murphy.—xvii. 582.

55. *Railway bonds—Trust conveyance—Construction of—Trustees—43 & 44 V. (P.Q.) c. 49—44 & 45 V. (P.Q.) c. 43—Privileged claim—Unpaid vendor—Immovables by destination.—Arts. 1973, 1996, 1998, 2009, 2017, C. C.*

In virtue of the provisions of a trust conveyance, granting a first lien, privilege and mortgage upon the railway property, franchise and all additions thereto of the South Eastern Railway Company, and executed under the authority of 43 & 44 V. (P.Q.) c. 49, and 44 & 45 V. (P.Q.) c. 43, the trustees of the bond-holders took possession of the railway. In actions brought against the trustees after they took possession, by the appellants for the purchase price of certain cars and other rolling stock used for operating the road, and for work done for, and materials delivered to, the company after the execution of the deed of trust, but before the trustees took possession of the railway—

Held, 1st, affirming the judgments of the court below, that the trustees were not liable.

2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when moveables become immoveable by destination, as was the result with regard to the cars and rolling stock in this case, and the immoveable to which the moveables are attached is in the possession of a third party or is hypothecated. Art. 2017, C. C.

3. But even considered as moveables such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder.

Railways and Railway Companies—Continued.

as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendors.

Per Gwynne, J., that the appellants might be entitled to an equitable decree, framed with due regard to the other necessary appropriations of the income in accordance with the provision of the trust indenture, authorizing the payment by the trustees "of all legal claims arising from the operation of the railway including damages caused by accidents and all other charges," but such a decree could not be made in the present action.

Per Strong, J.—*Quare*—Whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses should be adopted by courts in this country.

Wallbridge v. Farwell.

Ontario Car and Foundry Co. v. Farwell. } —xviii. 1.

56. Contract to build government railway—Government Railway Act, 44 V. c. 25, s. 109—Construction of term "employee"—Conditions precedent to exercise of compulsory powers of expropriation—Notice of action.

See EXPROPRIATION, 12.

NOTICE, 13.

57. *Railway company—Station buildings—Planked way—Invitation to public to use—Duty of company—Negligence.*

The approach to a station of the Grand Trunk railway from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass round the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go round the rear, when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company:

Held, Fournier and Gwynne, JJ., dissenting, that the company had neglected no duty which it owed to the deceased as one of the public.

Held, *per* Strong and Patterson, JJ., that while the public were invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass round a train in motion.

Railways and Railway Companies—*Continued.*

Held, *per* Taschereau, J., that the death of the deceased was caused by his own negligence.

The decision of the Court of Appeal, 16 Ont. App. R. 37, was affirmed.

Present: Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

Jones v. The Grand Trunk Railway Company of Canada.—xviii. 696.

58. *Railway company—Contract to carry passenger—Special contract—Reduced fare—Notice of conditions—Negligence.*

The plaintiff purchased from an agent of the defendant company at Ottawa what was called a land seeker's ticket, the only kind of return ticket issued on the route, for a passage to Winnipeg and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable and had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding \$100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, and having sore eyes at the time she was unable to read them herself. On the trip to Winnipeg an accident happened to the train and plaintiff's baggage, valued at over \$1,000, caught fire and was destroyed. In an action for damages for such loss the jury found for the plaintiff for the amount of the alleged value of the baggage.

Held, reversing the judgment of the Court of Appeal, 15 Ont. App. R. 388, and the Divisional Court, 14 O. R. 625, Gwynne, J., dissenting, that there was sufficient evidence that the loss of the baggage was caused by defendants' negligence, and the special conditions printed on the ticket not having been brought to the notice of plaintiff she was not bound by them and could recover her loss from the company.

Present:—Strong, Fournier, Taschereau and Gwynne, JJ.

Bate v. The Canadian Pacific Ry. Co.—14th June, 1889.—xviii. 697.

59. *Expropriation for railway—Prospective capabilities of property—Value to owner—Unity of possession—Advantage accruing to paper town from railway.*

See EXPROPRIATION, 13.

60. *Damages to property from works executed on government railway—Parol undertaking by officer of Crown to indemnify owners—Effect of.*

See CONTRACT, 47.

61. *Action against railway company—Death of employee—Injuries received in service of—Right of action—Prescription.*

See ACTION, 8.

PREScription, 20.

Railways and Railway Companies—Continued.

62. Construction of railway—Tender—Contract—Mutuality—
Action on bond.

See CONTRACT, 49.

63. Railway Co.—Injury to property by—Question of fact—By
whom work complained of was done.

See EVIDENCE, 55.

64. Expropriation for railway purposes—Award—Action to set
aside—Lands injuriously affected—R. S. Q. Art. 5164, ss. 12,
16, 17, 18, 24—43 & 44 V. c. 43 (P.Q.).

See ARBITRATION AND AWARD, 25.

65. Government railways—Negligence of servants of Crown—
Liability for—Construction of statute—44 V. c. 25—R. S. C.
c. 38—50 & 51 V. c. 16.

See CROWN, 27.

STATUTE, 15.

66. *Railway Co.—Negligence—Construction of road—Impairing
usefulness of highway.*

A railway company has no authority to build its road so that part of its road-bed shall be some distance below the level of the highway unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road and any other company operating it is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it.

A company which has not complied with the statutory condition of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of the carriage over the dangerous part of the highway on to the track though there was no contact between the engine and the carriage. *Grand Trunk Railway Company v. Rosenberger*, 9 Can. S. C. R. 311, followed.

G. T. R. Co. v. Sibbald; *G. T. R. Co. v. Tremayne*.—xx. 259.

67. Free railway tickets—Dominion Controverted Elections Act—
Corrupt practices.

See ELECTION, 44.

68. *Government railway—43 V. c. 8, construction of—Damage to
farm from overflow of water—Negligence—Boundary
ditches—Maintenance of.*

Held, affirming the judgment of the Exchequer Court, that under 43 V. c. 8, confirming the agreement of sale by the Grand Trunk Railway Company to

Railways and Railway Companies—Continued.

the Crown of the purchase of the Rivière du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879 unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear, by the evidence relied on, to have been caused through the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed.

Morin v. The Queen.—xx. 515.

69. *Railway Companies—As carriers of passengers—Measure of obligation as to latent defects—Arts. 1053, 1675, C. C., (P. Q.).*

Held, reversing the judgments of the Superior Court and Court of Queen's Bench for (L. C.), that where the breaking of a rail is shown to be due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. Fournier, J., dissenting, on the ground that as the accident was caused by a latent defect in the rail in use, the company was responsible:

Present.—Ritchie, C.J., and Strong, Fournier, Taschereau and Gwynne, JJ.

The Canadian Pacific Ry. Co. v. Chalifoux.—24 C. L. J. 501.—14th June, 1888.

70. *Expropriation of land for railway purposes—Value of land for railway purposes—Damages resulting from want of crossing.*

See EXPROPRIATION, 17.

71. *Expropriation of land for railway purposes—Refusal of Appellate Court to interfere with finding of judge of Exchequer Court as to amount of compensation.*

See EXPROPRIATION, 18.

72. *Mortgage of railway bonds as security for advances—Second mortgages—Purchase by—Trust—Hypothecation of bonds to bank.*

W. having agreed to advance money to a Railway Co. for completion of its road an agreement was executed by which, after a recital that W. had so agreed and that a bank had undertaken to discount W's. notes indorsed by E. to enable W. to procure the money to be advanced, the Railway Co. appointed said bank its attorney irrevocable, in case the company should fail to repay the advances as agreed, to receive the bonds of the company (on which W. held security) from a trust company, with which they were deposited and sell the same to the best advantage applying the proceeds as set out in the agreement.

Railways and Railway Companies—Continued.

The railway company did not repay W. as agreed and the bank obtained the bonds from the trust company and having threatened to sell the same, the company, by its manager, wrote to E. & W. a letter requesting that the sale be not carried out, but that the bank should substitute E. & W. as the attorney irrevocable of the company for such sale, under a provision in the aforesaid agreement, and if that were done the company agreed that E. & W. should have the sole and absolute right to sell the bonds for the price and in the manner they should deem best in the interest of all concerned and apply the proceeds in a specified manner, and also agreed to do certain other things to further secure the repayment of the monies advanced, E. & W. agreed to this and extended the time for payment of their claims and made further advances and, as the last mentioned agreement authorized, they re-hypothecated the bonds to the bank on certain terms.

At the expiration of the extended time the railway company again made default in payment and notice was given them by the bank that the bonds would be sold unless the debt was paid on a certain day named; the company then brought an action to have such sale restrained.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the bank and E. & W. were respectively first and second incumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees of the company in respect thereof, and there was no rule of equity forbidding the bank to sell or E. & W. to purchase under that sale.

Held, further, that if E. & W. should purchase at such sale, they would become absolute holders of the bonds and not liable to be redeemed by the company.

Held, also, that the dealing by the bank with the bonds was authorized by the Banking Act.

Nova Scotia Central Railway Co. v. Halifax Banking Co.—18th Dec. 1892.

—xxi. 536.

73. Railway company, bonus to—Condition in bond for repayment of bonus in event of company ceasing to be an independent company—Breach.

See BOND, 9.

74. Assessment of railway company—Statutory form—Departure from by general superintendent—53 V. c. 27, s. 125 (N.B.).

See ASSESSMENT AND TAXES, 26.

Ratification—Of forgery, can be none.

See FORGERY, 3.

Reasonable and Probable Cause.

See CAPIAS.

INSOLVENCY, 9.

LICENSE, 6.

MALICIOUS ARREST.

MALICIOUS PROSECUTION.

Rectory Lands—Church lands—Rector and wardens—Rectory endowments—Rectory lands—29-30 V. c. 16—Construction.

Held, affirming the judgment of the courts below, that the lands in question in this case were rectory lands within the meaning of the Act, 29 & 30 V. c. 16, entitled "An Act to provide for the sale of rectory lands in this Province."

Held, also, that the lands were held by the rector of the Church of St. James, in the city of Toronto, as a corporation sole for his own use, and not in trust for the vestry and church wardens or parishioners of the rectory or parish of St. James, and such vestry and churchwardens had therefore no *locus standi in curia* with respect to said lands.

Du Moulin v. Langtry.—xiii. 258.

[In this case the Judicial Committee of the P. C. refused leave to appeal. **Held**, that "where the determination of a case will not be decisive of any general principle of law, the Judicial Committee will not give leave to appeal from a unanimous judgment of the court below, on the ground that the questions involved are either of great importance to the parties, or calculated to attract public attention, 57 L. T. (N. S.) 17].

Registration—Agreement that mortgage should have priority.

See MORTGAGE, 1.

2. Deed creating easement—Should be registered under Rev. Stats. (N. S.), 4th series, c. 79, ss. 9 & 19—Defeated by registration of subsequent conveyance without notice.

See TRESPASS, 5.

3. Purchase for value without notice.

See MORTGAGE, 9.

4. Bar of dower in mortgage duly registered—Non-registration of prior mortgage in which dower not barred—Sale of lands under registered mortgage—Claim of wife to share of proceeds in priority to first mortgagee.

See MORTGAGE, 29.

5. Conventional subrogation—Art. 1155, s. 2, C. C.—Erroneous noting of deed by registrar.

See SUBROGATION.

6. Of transfer of locatee's rights—Waiver by Crown of performance of settlement duties—23 V. c. 2, ss. 18 & 20 (Q.)—32 V. c. 11, s. 13 (Q.)—36 V. c. 8 (Q.).

See CROWN LANDS, 1.

Registration—Continued.

7. Of donation *Inter vivos*—Neglect to register—Art. 806, C. C., forfeiture under, applicable only to gratuitous donations.

See DONATION, 2.

8. *Registry Act—R. S. N. S. 5th ser. c. 84, s. 21—Registered judgment—Priority—Mortgage—Rectification of mistake.*

By R. S. N. S. 5th ser. c. 84, s. 21, a registered judgment binds the lands of the judgment debtor, whether acquired before or after such registry, as effectually as a mortgage; and deeds or mortgages of such lands, duly executed but not registered, are void against the judgment creditor who first registers his judgment.

A mortgage of land was made, by mistake and inadvertence, for one-sixth of the mortgagor's interest instead of the whole. The mortgage was foreclosed and the land sold. Before the foreclosure judgment was registered against the mortgagor and two years after an execution was issued and an attempt made to levy on the five-sixths of the land not included in said mortgage. In an action for rectification of the mortgage and an injunction to restrain the judgment creditor from so levying—

Held, affirming the judgment of the court below, Strong and Patterson, JJ., dissenting, that the agreement to give a mortgage of the five-sixths of the said land was void as against the judgment of the creditor. *Grindley v. Blaikie*, 19 N. S. Rep. 27, approved and followed.

Miller v. Duggan.—xxi. 88.

9. Agreement to pledge railway property for disbursements—Void as against creditors for non-registration—Arts. 1977, 2015 & 2094, C.C.

See PLEDGE, 5.

Release—Joint tort-feasors—Discharge of one—Effect of.

See RAILWAYS AND RAILWAY COMPANIES, 48.

2. Of debt—Assignment in trust for creditors—Authority to sign for creditor—Ratification—Estoppel.

See ASSIGNMENT, 14.

Remoteness—Devise void for.

See WILL, 1.

Renunciation—To the community.

See OPPOSITION.

Replevin—Contract not to distrain.

See DISTRESS, 1.

Replevin—Continued.**2. Possession as against wrong-doer—Mixture of logs.**

L. et al., claiming certain lands in the township of Horton under a paper title, built a barn and camp in 1875, commenced and continued logging all that winter and in subsequent years. In 1877 McD., setting up a title under certain proceedings, adopted at a meeting of the inhabitants of the township in 1847, held for the purpose of making provision for the poor, by which certain commissioners were authorized to sell vacant lands, entered upon and cut on the lands in question some 500 trees, which he put on the ice outside and inside *L. et al.*'s boom, mixing them with some 900 logs already in said boom and cut by *L. et al.*, in such a way that they could not be distinguished. McD. then claimed the whole as his own, and resisted *L. et al.*'s attempt to remove them. Action of replevin brought by *L. et al.* for 1,440 logs cut on said lands.

Held, that *L. et al.*'s possession of the lands in question was sufficient to entitle them to recover, in the present action against McD., who was a wrong-doer, all the logs cut on the lands.

Per Strong, J.—When one party wrongfully intermingles his logs with those of another, all the party whose logs are intermingled can require is, that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed.

McDonald v. Lane.—vii. 462.

3. Possession by Sheriff under writ of.

See CONTRACT, 14.

4. Bill of lading—Assignment of—Property in goods under—Stoppage in transitu.

See BILL OF LADING, 8.

5. Married woman—Property given to, by husband—Execution against husband—Justification by sheriff—Married Woman's Property Act, R. S. (N.S.) 5th series, c. 74.

See SHERIFF, 12.

Representation—Marine insurance—Promissory representation—"Would tow up and back."

See INSURANCE, MARINE, 81.

Requete Civile.

See OPPOSITION, 2.

SHERIFF, 5.

Rescission—Bill for, on ground of fraud.

See SALE OF LANDS, 6.

2. Of contract.

See CONTRACT, 28.

Res inter alios acta.—Judgment against original vendor in hypothecary action against sub-purchasers.

See SALE OF LANDS, 9.

Res Judicata—Sale *à réméré*—Term within which to exercise right—Action brought before time to exercise right arrived—Not *res judicata*.

See SALE OF LANDS, 21.

2. Judgment setting aside intervention to seizure of bank shares—Substitution—Art. 1241, C. C.

See JUDGMENT, 11.

3. Condition of contract—Carriage by railway—Non-performance—Demurrer—Acquiescence in judgment on.

See RAILWAYS AND RAILWAY COMPANIES, 43.

4. *Judgment in former suit—How far binding on Dominion Government.*

Per Gwynne, J.—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.

Fonseca v. Attorney-General of Canada.—rvii. 612.

See LETTERS PATENT, 2.

5. Assignment of chose in action—Practice—Parties to suit—Judgment on demurrer.

See PRACTICE, 25.

6. *Court equally divided—Effect of judgment.*

When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the parties to the litigation only, and the court when a similar case is brought before it is not bound by the result of the previous case.

Stanstead Election Case, (Rider v. Snow).—xx. 12.

7. *Action en reprise d'instance* by legatee—Contestation of will—Invalidity of will—*Res judicata*—Art. 439, C. C. P.—Final judgment—R. S. C. c. 135, ss. 2, 24 and 28.

See JURISDICTION, 104.

Residuary Personal Estate—*See* WILL, 6.**Respondent Superior—***See* ASSESSMENT, 8**Retraxit—***See* PRACTICE, 10.**Returning Officer—Neglect of duty—Effect of.***See* ELECTION, 12.**Revendication—Of bonds deposited as collateral security.***See* BONDS.**2. Of goods.***See* DAMAGES, 30.**3. 36 V. c. 81 (P.Q.)—Booms—Proprietary rights—Replevin—
(Re-vendication)—Estoppel by conduct.**

O'S. claiming to be the legal depositary, and T. McG. claiming to be usufructuary under 36 V. c. 81 (P.Q.), of certain booms, chains, and anchors in the Nicolet river, which G. B., being in possession of for several years under certain deeds and agreements from T. McG., had stored in a shed for the winter, brought an action *en revendication* to replevy the same and for \$5,000 damages.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that O'S. and T. McG. were not entitled to the possession as alleged, and that they were precluded by their conduct and acquiescence from disturbing G. B.'s possession. *Ball v. McCaffrey*, 20 Can. S. C. R. 317, approved.

O'Shaughnessy v. Ball.—xxi. 415.**Revenue—***See* CUSTOMS DUTIES.

CONSTITUTIONAL LAW.

Review, Court of, P. Q.—No appeal to Supreme Court from judgment of.*See* JURISDICTION, 12.[But *see* now S. C. Act, 1891, c. 25, s. 3.]**2. New trial ordered by, in case tried in a rural district—34 V. c. 4, s. 10, and 35 V. c. 6, s. 13 (P.Q.).***See* RAILWAYS AND RAILWAY COMPANIES, 14.**Right of Way—Public—Extinguished by necessary implication.***See* ACCRETION, 1.

Right of Way—Continued.

3. Possessory action—Plea of having exercised right of way for many years.

See POSSESSORY ACTION.

Riparian Proprietors—Rights of, as to fishing.

See PETITION OF RIGHT, 4.

FISHERIES, 3.

2. *Navigable river—Access to, by riparian owner—Right of—Railway company responsible for obstruction—Damages—Remedy by action at law—When allowed—43 & 44 V. (P.Q.) c. 43, s. 7, s.-ss. 3 & 5.*

Held, reversing the judgment of the court below, Taschereau, J., dissenting, that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property.

2. That the railway company, in the present case, not having complied with the provisions of 43 & 44 V. (P.Q.) c. 43, s. 7, s.-ss. 3 & 5, the appellant's remedy by action at law was admissible.

Pion v. North Shore Ry. Co.—xiv. 677.

[In this case the Judicial Committee affirmed the judgment of the Supreme Court. See 14 App. Cases, 612. At p. 614, it is stated that Mr. Justice Strong dissented from the judgment of the court. This is an error: Mr. Justice Strong concurred with the majority of the court in allowing the appeal].

See Bigaouette v. North Shore Ry. Co.—xvii. 363.

EXPROPRIATION, 10.

3. Expropriation for railway purposes—Navigable river—Right of *accès et sortie* by riparian proprietor.

See EXPROPRIATION, 10.

4. *Damage to land by construction of dam—Servitude—Arts. 503, 549, 2193, C. C.—C. S. L. C. c. 51—Improvement of water courses.*

Where a proprietor, for the purpose of improving the value of a water power, has built a dam over a water course running through his property and has not constructed any mill or manufactory in connection with the dam, he cannot, in an action of damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify, under the provisions of c. 51, C. S. L. C. Nor can he acquire by prescription a right to maintain the dam in question; Arts. 503, 549, C. C.; nor can he claim

Riparian Proprietors—Continued.

title by possession to the land overflowed without proving the requirements of Art. 2198, C. C.

Jones v. Fisher.—xvii. 515.

5. Land ordinance, 1865—Grant of water under—Right to exclusive use of stream—Unoccupied water—Proof of notice of application for grant.

The British Columbia Land Ordinance, 1865, contains the following provisions:—

44. "Every person lawfully occupying and *bona fide* cultivating lands may divert any unoccupied water from the natural channel of any stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the stipendiary magistrate of the district for the purpose, and recording the same with him, after due notice, as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such magistrate may require."

45. "Previous to such authority being given, the applicant shall post up in a conspicuous place on each person's land through which it is proposed that the water should pass, and on the District court house, notices in writing, stating his intention to enter such land, and through and over the same to take and carry such water specifying all particulars relating thereto, including direction, quantity, purpose and term."

In an action by a grantee of water under this ordinance for interference with the use of the same,

Held, affirming the judgment of the court below, that the ordinance was not passed for the benefit of riparian owners only, but any cultivator of land could obtain a grant of water thereunder.

Held, further, that the water of a stream, etc., may be unoccupied under the ordinance even though there may be a riparian proprietor upon a part of it.

Held, also, Ritchie, C.J., and Strong, J., dissenting, that the provisions of s. 45 are merely directory but if imperative a grantee of water under the ordinance who has used the water granted to him for several years would not be required, in an action for damages caused by interference with such user, to prove that he gave the notices required by that section as it would be presumed that the same were given before recording the grant.

Held, *per* Ritchie, C.J., and Strong, J., that the water records in evidence were imperfect and the grant to plaintiff was not proved thereby; that having failed to prove authority from the magistrate to direct the water his riparian rights either at common law or under the ordinance were not established and the action failed.

Martley v. Carson—xx. 634.

[Leave to appeal in this case was granted by the Judicial Committee of the Privy Council, but the appeal was dismissed without consideration of the merits of the case on it appearing that the appellant Clark had parted with his interest in the property.]

Rivers—Obstruction in navigable.*See* LEGISLATURE, 8.

NAVIGATION.

RIPARIAN PROPRIETORS, 2.

Road—*Road under control of The Quebec North Shore Turnpike Road trustees—Petitory action by trustees—No title to support—No possession by trustees except of ground actually used by public—Semble, the property in such roads vested in the Crown—Power to widen by expropriation—36 Geo. III. c. 9—4 V. c. 17—18 V. c. 100, s. 41 (Q.).*

The appellants, as owners in trust and administrators of a certain turnpike road, extending from the city of Quebec to a place called Sant-a-la-Puce, instituted the present suit against the respondent to rectify an encroachment upon the said road. They alleged in their declaration: "That in the month of June, 1880, or about that time, the defendant illegally and without any right whatsoever, unjustly took possession of a part of the property belonging to plaintiffs, to wit: of a part of the aforesaid road, hereinabove described, being about 20 feet front by 5 feet in depth of the said road, situate in the said parish of Château Richer on the north side of said road, opposite a lot of land belonging to and possessed by the defendant. . . That the said defendant, after having thus illegally, knowingly and without any right, taken possession of the said piece of land, dug deeply in and under the said road and erected and built on the said piece of land a building or cellar, and committed other acts and encroachments, which he had no right to commit, thereby decreasing the legal width of the road by at least 5 feet."

The delay for bringing an action *en démolition* being expired, the appellants by their conclusions asked to be declared proprietors in possession of said road and to have the said building or cellar removed in the ordinary course of law.

To this action the respondent pleaded (1) the general issue, and (2) specially by a peremptory exception that the part of the said road which ran through his land was a portion of said land; that he acquired said land at sheriff's sale; that he was owner of the land on each side of the road, which in the said place was bounded on the north by a ditch and on the south by a fence, and that the building of the said cellar in no way encroached upon the road in question.

The road was put under the control of the appellants by the 16th V. c. 235, s. 5, s-s. 9, in 1853. The width of main roads or the King's Highways was regulated then by the 36 Geo. III. c. 9, s. 2: "And be it further enacted, by the authority aforesaid, that the King's Highways shall be thirty feet wide between two ditches, each of three feet wide, and of sufficient depth to drain off the water, and where the said highways are not already thirty feet wide, [French measure—equal to thirty-one feet ten and one-half inches English]—the Grand Voyer, if he shall think it necessary and practicable, shall cause them to be widened by the person bound to repair the same."

Road—Continued.

The statute which created the trust, ordinance 4 V. c. 17, s. 8, vested the trustees with all the powers which were vested in the Grand Voyers or the municipal councils by 36 Geo. III. c. 9, and by ordinance, 4 V. c. 4, ss. 37 and 45; 8 V. c. 40, ss. 28 and 30; 10 & 11 V. c. 7, ss. 33 and 39.

And it ordered and enacted that the said trustees, in the manner which they deem fit, might cause the said roads and each of them, and the bridges thereupon, to be improved and widened, repaired and made anew, and might, for the purposes aforesaid, or any of them, by themselves, their agents and servants, go into and enter upon, and take any land or real property.

In support of their pretension that the road should be thirty-six feet wide (French measure) the ditches forming part of the road, the appellants cited 41st s. of 18 V. c. 100 (Q.), which amended the existing law as to the width of highways: "No front road hereafter to be opened shall be less than thirty-six feet (French measure) in width," and argued that this Act must have been based on the general custom which had existed up to that time of making all front roads thirty-six feet wide (French measure.)

In 1854 the appellants macadamized the road in question and made the ditch on the north side of the road, thereby fixing, themselves, the limit of the road; and the evidence showed they placed it there because there is on the north side of the road a hill which terminates at the ditch, and at the distance of one foot, and one foot nine inches from the edge of the ditch, in front of the cellar, the ground is four feet some inches higher than the level of the road, therefore it was not possible to pass there, or to make a ditch to drain the road.

The appellants made the ditch at the foot of the hill, the only place where it was practicable to make it; and they thereby left beyond the ditch and consequently beyond the road the ground they claimed as forming part of the road. The south side of the road was bounded by a fence, and between the fence and the north-east side of the ditch there was a width of thirty feet, and from the edge of the north-east side of the ditch to that of the corner of the cellar, there was a width of one foot nine inches; at the south corner the width was nine inches less.

The appellants' action was maintained in the Superior Court by Mr. Justice Casault.

Respondent having carried the case to the Court of Queen's Bench, three of the honorable judges, Dorion, C.J., and Monk and Tessier, JJ., reversed the judgment of the Superior Court, Cross and Baby, JJ., dissenting. (The judgment of Dorion, C.J., will be found reported in 3 Dorion's Q. B. R. 65.)

The appellants appealed to the Supreme Court of Canada and claimed that the said judgment of the Court of Queen's Bench should be reversed for, amongst others, the three following reasons, because: 1st. They had a perfect right to bring the action they instituted against the respondent; 2nd. The road in question should be 38 feet 3 inches (equal to 36 feet French measure) wide at least; and 3rd. Respondent had decreased the legal width of the road by at least 5 feet, which he was bound to restore to the appellants.

Held, per Ritchie, C.J., and Fournier and Henry, JJ., that the road was an ancient road which was not of the width of 30 feet (French measure) when

Road—Continued.

the appellants received control of it; that the law clearly recognized such roads, and contemplated that the Grand Voyer, if he should think it necessary and practicable, should cause such roads to be widened, and this he had never done as regards this road; that the appellants in 1854 appear to have taken the road in the state it then was, and never to have exercised the power of widening it given them by 4 V. c. 17, upon paying an indemnity to the proprietor; and that whether the road was the legal width or not the appellants had no right to any ground beyond what formed part of the road, and served as such for the use of the public and for the ditches, if any; and therefore could not claim the ground beyond the ditch on the north side of the road, which could not be, and never was, used by the public, and never formed part of the road.

Per Strong and Henry, JJ., that the property of the road was vested in the Crown, and the effect of the statutes was not to take the property out of the Crown and vest it in the trustees, but to make them custodians of the road and the tolls, for the benefit of the bondholders and the public. The appellants failed to show either title or possession, and the action therefore failed.

Appeal dismissed with costs. (Gwynne, J., dissenting.)

The Quebec North Shore Turnpike Road Trustees v. Yezina.—8th March, 1884.

2. Road Co.—Collector of tolls—Negligence—Liability of company.

See NEGLIGENCE, 37.

3. Statute—Application of—R. S. O. (1887), c. 159—53 V. c. 42—Application to company incorporated by special charter—Collection of tolls—Maintenance of road—Injunction.

See CORPORATIONS, 49.

HIGHWAY.

Road allowance.

See HIGHWAY, 1, 4; 6.

S.

Saisie Conservatoire—Petition contesting seizure before judgment—Judgment ordering petition to be proceeded with at same time as main action—Not appealable—S. & E. C. Act, R. S. C. c. 135, ss. 24 & 28.

See JURISDICTION, 79.

Saint John, City of.

See ASSESSMENT AND TAXES, 3, 6, 9, 11.

CONTRACT, 4, 20.

Sale of Goods—Damages for breach of warranty—Subsequent action for price—Evidence in mitigation.

C., wishing to procure a water wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, A. undertook to put in a "Four-Foot Sampson Turbine Wheel," which he warranted would be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time for payment of the agreed price of the article having elapsed, C. sued A. for breach of the warranty and recovered \$438 damages. A. subsequently sued C. for the price, and C. offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C. to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended, and the learned judge presiding at the trial declared the evidence inadmissible.

Held, on appeal, reversing the judgment of the Court of Appeal for Ontario, that as the time for payment of the agreed price of the article had elapsed when the first action was brought, and only special damages for breach of warranty had been recovered, the evidence tendered by C. in this case of the worthlessness or inferiority of the article was admissible. Strong, J., dissenting.

Church v. Abell.—i. 442.

2. Sale of goods—Goods sold by agent as principal—Right of set-off.

The B. M. Co. (plaintiffs) sued D. (defendant) for goods sold and delivered. D. pleaded that the goods were sold to him by one A., whom the defendant believed to be the principal, and that before the defendant knew that the plaintiffs were the principals, the said A. became indebted to the defendant in the sum of \$400, which he, the defendant, was willing to set-off against the plaintiff's claim. The jury found a verdict for the defendant on this plea.

Held, that the defendant, having purchased the goods without notice of A.'s being an agent, and A. having sold them in his own name, could set-off the debt due to him from A. personally, in the same way as if A. had been the principal; and that the verdict should be sustained.

The Bowmanville Machine Co. v. Dempster.—ii. 21.

3. Timber, sale.

See AGREEMENT, 1, 4.

4. Contract for purchase of corn—Bill of lading—Draft on purchasers—Jus disponendi—Delivery.

W., a commission merchant, residing at Toledo, Ohio, purchased and shipped a cargo of corn on the order of C. et al., distillers at Belleville, and drew on them at ten days from the date for the price, freight and insurance. This draft was transferred to a bank in Toledo and the amount of it received by W. from the bank, and the corn having been insured by W. for his own benefit, was shipped by him under a bill of lading, which together with the

Sale of Goods—Continued.

policy of insurance, was assigned by him to the same bank. The bank forwarded the draft, policy and bill of lading to their agents at Belleville, with instructions that the corn was not to be delivered until the draft was paid. The draft was accepted by *C. et al.*, but the cargo arriving in Belleville in a damaged and heated condition, between the dates of the acceptance and the maturity of the said draft, *C. et al.* refused to receive it, and afterwards to pay draft at maturity. Thereupon the bank and W. sold the cargo for behalf of whom it might concern, credited *C. et al.* with the proceeds on account of draft, and W. filed a bill to recover balance and interest.

Held, reversing the judgment of the Court of Appeal for Ontario, Strong, J., dissenting, that the contract was not one of agency, and that the property in the corn remained by the act of W. in himself and his assignees, until after the arrival of the corn at Belleville and payment of the draft; and the damage to the corn having occurred while the property in it continued to be in W. and his assignees, *C. et al.* should not bear the loss.

Corby v. Williams.—vii. 470.

5. *Sale of fish in storage—Right to hold goods by bailee for unpaid purchase money—Delivery of part.*

Action of trover charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. R. the respondent's assignor. One of the branches of appellant's business was supplying merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold and the proceeds placed by appellants to credit of their customers. One S., who so dealt with appellants, in October, 1877, sent them 77 barrels of herring and 236 barrels of mackerel. On 3rd November, 1877, S. sold all the fish he had, including those mackerel, to one R. at \$8 a barrel, when some were delivered, leaving 236 barrels in the appellants' store, and in payment received \$4,000 and a promissory note for \$4,000 at four months. This note was given to appellants by S. on account of his general indebtedness. On the 4th March, 1878, R. became insolvent, and the respondent, who was subsequently appointed assignee, demanded the 236 barrels of mackerel and brought an action to recover the same. After issue was joined, the appellants proved against the estate of R. on the note and received a dividend on it. The chief justice at the trial gave judgment for \$1,888, less \$46.10 for one months' insurance and six months' storage, and found that the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting.

Held, Strong, J., dissenting, that the appellants having failed to prove the right of property in themselves, upon which they relied at the trial, the respondent had as against the appellants' a right to the immediate possession of the fish.

2. That S. had not stored the fish with appellants by way of security for a debt due by him, and as the appellants had knowledge that the fish sued for were included by the insolvent in the statement of his assets, to which statement they made no objection, but proved against the estate for the whole

Sale of Goods—Continued.

amount of insolvent's note, and received a dividend thereon, they could not now claim the fish or set up a claim for lien thereon.

Troop v. Hart.—vii. 512.

6. *Unwritten commercial contract for—Acceptance, evidence of—Parol admissible—Art. 1235, C. C. (P.Q.).*

Held, reversing the judgment of the court below, that in an action in the Province of Quebec upon an unwritten commercial contract for the sale of goods exceeding the sum of \$50, oral evidence of acceptance, or receipt, of the whole, or any part of the goods, is admissible, under Art. 1235, C. C.

Munn v. Berger.—x. 512.

7. *Consignment of goods subject to payment—Agreement that purchaser shall not sell—Passing property.*

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made up certain payments. Without making such payments, however, A. sold the oil to the defendants, without the knowledge of the plaintiff.

Held, affirming the judgment of the Court of Appeal for Ontario, that although the defendants were purchasers for value from A., in the belief that he was the owner and entitled to sell the oil in question, the plaintiff, under his agreement with A., having retained the property in the oil, and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil.

Forristal v. McDonald.—ix. 12.

8. *Contract—Appropriation—Payment.*

See **CONTRACT**, 5.

9. *Stoppage in transitu—Goods in bond.*

See **STOPPAGE IN TRANSITU**.

10. *Contract, parol evidence to establish when admissible—As to whether a mem. in writing contained the terms of agreement, a question for jury—Statute of frauds—Damages—Common counts.*

The plaintiff sued defendants upon a contract alleged to have been made by them with the plaintiff to deliver to the plaintiff at Saint John, N. B., 200 cords of good merchantable hemlock bark, suitable for tanning, at \$4 per cord, the plaintiff paying freight from Shediac. He also declared upon the common money counts.

The plaintiff at the trial gave evidence to the effect that the contract was wholly verbal, and that the defendants had agreed that the bark should be all good bark; that it was to be delivered at St. John and measured on the cars there; that the defendants were to send some one to measure it, and that if they did not plaintiff's son was to measure it; that the plaintiff was to pay freight from Shediac, where the defendants were to load it on the cars, and as

"C. H. PETERS, ESQ.,

"1876.

" TO HAMILTON & SMITH.

" April 20, To 200 cords hemlock bark at Shediac, \$4.....\$800 00

“	“	“	“	4	84
---	---	---	---	---	----

8804 84

CR.

" By note at 4 mos.....\$500 00

" goods per statement of acct.....	304 84
------------------------------------	--------

\$804 84

"The above bark to be measured on the cars in St. John.

" Settled as above.

"HAMILTON & SMITH."

Upon this document being produced the defendants insisted that it contained the contract and that the plaintiff's evidence of the contract must fall to the ground. Both parties were permitted to give oral testimony to establish what the contract was. The evidence was chiefly that of the plaintiff and defendant Hamilton, and was very contradictory. The jury believed the plaintiff and rendered a verdict for him for \$945.80 damages.

The Supreme Court of New Brunswick made a rule for a new trial absolute, being of opinion that the contract had been reduced to writing and was contained in the memorandum of the 20th April, 1876; that the words "at Shediac" in the memorandum showed that the bark was at Shediac at that time, and that the parties were contracting with reference to that particular bark. That being the case, it was unnecessary to make any stipulation about the delivery, because by the sale the property vested in the plaintiff without any delivery, and the evidence of the plaintiff as to delivery should not have been received, for it was either immaterial, or the effect of it was to vary the terms of the written contract, which, being for the sale of goods above the value of £10 was required by the Statute of Frauds to be in writing.

On appeal to the Supreme Court of Canada, **Held**, that whether the mem. of the 20th April, 1876, was or was not drawn up by the consent of both parties with intent to be that which should settle and contain their contract in whole or in part was a question for the jury, and the *onus* of proving that the document was drawn up for that purpose lay upon the defendants. That

Sale of Goods—Continued.

the nature of the case required that both parties should be permitted to give oral testimony to establish what the contract was, and as the jury had wholly disbelieved the defendants' evidence the plaintiff was entitled to recover both on the common counts and on the special counts, and the verdict of the jury should not have been set aside.

Appeal allowed with costs.

Peters v. Hamilton.—10th June, 1880.

11. Contract of sale—Goods not specified—Intention to pass property—Appropriation.

T., a brick-maker, sold by sample 50,000 bricks out of a kiln containing 100,000, to the plaintiff, who paid the contract price, and hauled away about 16,000. The balance remained in the kiln in T.'s yard, and were never in any way separated from the rest of the kiln, or appropriated to the plaintiff. The defendant (the sheriff) subsequently sold them under an execution at the suit of W. against T. Plaintiff brought trover against the defendant, claiming property in 84,000 of the bricks.

The Supreme Court of New Brunswick held (Wetmore, J., dissenting), that the contract was executed, and the property in the bricks passed to the plaintiff at the time of sale. 4 Pugs. & Bur. 284.

On appeal to the Supreme Court of Canada, Held, reversing the judgment of the court below, that the sale was one by sample; the bricks sold were not specifically ascertained, and there was no evidence from which it could be inferred that it was the intention of the parties the property in the bricks should pass before delivery.

Appeal allowed with costs.

Temple v. Close.—16th February, 1881.

12. Plea of tender and payment into court acknowledges liability—Agent—Contract by, for undisclosed principal—Sale, with privilege of taking bill of lading, or reweighing at seller's expense.

An action instituted by the Canada Shipping Co., to recover \$3,088.44, being the price of 810 tons, 5 cwt. of steam coal sold by their agents, Thompson, Murray & Co., through T. S. Noad Broker as per following note.

"No. 3,435.

"MONTREAL, 13th Aug., 1879.

"Messrs. Thompson, Murray & Co.:—

"I have this day sold for your account, to arrive, to the V. Hudon Cotton Mills Company, the 810 tons, 5 cwt. best South Wales Black Vein Steam Coal, per bill of lading, per 'Lake Ontario,' at \$8.75 per ton of 2,240 lbs., duty paid, ex ship; ship to have prompt despatch.

"Terms, net cash on delivery, or 80 days adding interest, buyers' option.

"Brokerage payable by you, buyer to have privilege of taking bill of lading, or re-weighing at sellers' expense."

Sale of Goods—Continued.

The defendants pleaded that the contract was with Thompson, Murray & Co. personally, and that the plaintiffs had no action; and, by a second plea, that the cargo contained only 755 tons, 580 lbs., the price of which was \$2,868.72, which they had offered Thompson, Murray & Co., together with the price of 10 tons more to avoid litigation, in all \$2,890.72, which they brought into court, without acknowledging their liability to the plaintiffs, and prayed that their action be dismissed as to any further or greater sum.

It was proved that the defendants agreed to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons, 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency.

The Court of Queen's Bench for Lower Canada, Held, 1. That the plaintiffs had a right to bring an action to recover the price of coal sold by their agents in their own name, and without disclosing their principals.

2. That the defendants had no right to refuse payment for the cargo on the ground of deficiency in the delivery, considering that the weighing was made by the defendants in the absence of plaintiffs, and without notice to them, and at a time when the defendants were bound by the option they had previously made of taking the coal in bulk.

3. That the defendants in tendering and depositing in court the sum of \$2,890.72 as the value of the quantity of coal actually received, had acknowledged their liability towards the plaintiffs. See 2 Dorian's Q. B. R. 356.

On appeal to the Supreme Court of Canada, Held, *per Ritchie, C.J.*, and Taschereau and Gwynne, JJ., that it was unnecessary to decide the question as to whether the action could be brought by the undisclosed principal, for by their plea of tender and payment into court the defendants had acknowledged their liability to the plaintiffs, although such tender and deposit had been made "without acknowledging their liability;" Fournier and Henry, JJ., dissenting.

Per Strong, J.—That the action by respondents (undisclosed principals) was maintainable.

Per Fournier and Henry, JJ., that the action by respondents (undisclosed principals) was not maintainable, and that the appellants were not precluded from setting up this defence by their plea of tender and payment into court.

At the trial it was proved that the defendants agreed to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons, 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency.

Held, Fournier and Henry, JJ., dissenting, that the appellants had no right to refuse payment for the cargo on the grounds of deficiency in the delivery, considering that the weighing was made by the defendants in the absence of the plaintiffs and without notice to them, and at a time when the

Sale of Goods—Continued.

defendants were bound by the option they had previously made of taking the coal in bulk.

Y. Hudon Cotton Company v. Canada Shipping Co.—xiii. 401.

13. Agreement for sale of deals—Contract not complete—New trial.

Action for an alleged agreement contained in the following letters :—

Moncton, September 18th, 1880.

Messrs. T. L. DeWolf & Co., Halifax :—

Dear Sirs,—I will sell and deliver to you on the cars at Port du Chene, all the merchantable deals and deal ends I can manufacture at my mill at Meadow Brook, this season and next, during the shipping season, an estimated quantity from two to three millions. Deal ends not to exceed what may be required for broken stowage, and to be from three to eight feet long.

Price—nine dollars per thousand superficial feet for deals, and two-thirds price of deals for ends, and fourths, if any.

SPECIFICATION :

33 per cent.,	7 x 8 and 8 x 3
35 "	9 x 3
10 "	10 x 3
14 "	11 x 3
8 "	12 x 3 and upwards.

Average length, fourteen feet or more.

About ten per cent. pine, balance spruce.

The pine I will stick and pile well, and keep on my wharf until you require them sent forward.

About two millions to be ready for shipment by the first of July next, and a large portion ready as soon as navigation opens.

Terms—cash on delivery.

This offer to hold good until the first of October next.

Yours truly,

(Signed)

ABNER JONES.

HALIFAX, 29th September, 1880.

Abner Jones, Esq., Moncton :—

Dear Sir,—We wired you this morning that we accepted your offer for next season's cutting of deals, which we now beg to confirm. If you have any deals sawn this fall we might be able to take them here, we paying the difference of railway freight between Point du Chene and Halifax. Please let us know what quantity you think you will cut this fall, what railway freight per car is to Halifax, and also to Point du Chene.

Please let us know if you would ship what you cut this fall to Halifax if we require them.

We accept your offer, as made in your letter of the 18th inst., in all particulars.

Sale of Goods—Continued.

We think this will serve instead of writing out a contract, but if you require it, will fill one up and send you.

Yours truly,

T. L. DeWOLF & Co.

* The action was tried before Mr. Justice King, at the Westmorland circuit, in December, A. D., 1881, and resulted in a verdict for plaintiff for \$3,500. The jury were directed to find for the plaintiff, and that the only question related to the damages to be awarded plaintiff.

The defendants' counsel moved for a non-suit at the close of the plaintiff's case.

The defendants applied to the court *en banc* to set aside the verdict, and that a new trial be ordered on the grounds set out. This was granted.

The learned judge at the trial held that the letters of the 18th September, 1880, and 29th September, 1880, constituted a complete and binding agreement, and that the subsequent correspondence between the parties did not show that such agreement was rescinded.

The court (Allen, C.J., Weldon, J., Wetmore, J., Palmer, J. and Fraser, J.—King, J., delivering a separate judgment) in granting a new trial dealt only with these points, and held that the two letters above quoted constituted a complete binding contract between the parties, but that both agreed to abandon it—or, at all events, that certain letters were evidence of such abandonment—and that in this respect the direction to the jury was incorrect.

King, J., while also of opinion that the two letters constituted a complete and binding contract, was inclined to think that there was a question for the jury whether the conduct of the plaintiff, after receiving the defendants' letter of the 17th December, and that in reply to his of the 16th December, was not such as to show that plaintiff acquiesced in the defendants' notice of refusal to abide by the bargain.

On appeal to the Supreme Court of Canada, Held, that the two letters of the 18th and 26th September, 1880, did not constitute a complete contract between the parties. The rule having been taken for a new trial only, the court refused to direct a non-suit or verdict for defendant, but affirmed the rule for a new trial. (Counsel for respondent not called on.)

Appeal dismissed with costs.

Jones v. DeWolf.—26th February, 1884.

14. *Fraudulent scheme to obtain goods—And to give inadequate security—Simulated hypothec—Right to sue for price.*

There were special counts in the plaintiff's declaration in this case, alleging that goods were sold to the defendants on a representation that the latter were the holders for value of a certain obligation and hypothec in their favour by one Theodore Roy, of Montreal, for \$3,000, payable by yearly instalments of \$1,000, with interest; that such obligation represented the balance due defendants from said Roy on the purchase of certain real estate sold to Roy, and on which he had paid \$300 at time of purchase, and that Roy was a man of means and had other property. The plaintiff sold goods to the

Sale of Goods—Continued.

defendants to the amount of \$2,000, and accepted as payment the first two instalments of said obligation, which were duly assigned to him, the defendant Roy not being present at the time of such assignment, but afterwards being taken to the notary's office, where he accepted the said transfer. The declaration then alleged that the said representations by the defendants were false and fraudulent; that the transfer of the property to Roy and the said obligation were fraudulently made to enable the defendants to use the said obligation to obtain credit; that Roy never paid anything on account of the purchase of the real estate, or entered into possession thereof, but that defendants kept possession and collected the rents of the property; that the defendant Roy was not a man of means, but was a pauper and not carrying on any trade or business which the defendants knew, and that he was simply a *prête nom* for the defendants. The declaration also contained the common counts. The plaintiff therefore concluded that he had a right to demand the price of the said goods from the defendants, and prayed that the obligation be set aside as regards the plaintiff, and that it be declared that said Roy was the agent (*prête nom*) of the defendants, and that defendant be condemned to pay the sum of \$2,000, with interest and costs.

The defence was that the allegations in said declaration were false; that the transactions with Roy were *bond fide* and the sale an actual one; that the instalments of said obligation were accepted by plaintiff in payment of the goods after due enquiry; and that even if the allegations were true the plaintiff could not maintain his present action.

The Superior Court gave judgment for the plaintiff, finding that the property was worth much less than \$2,000; that Roy never paid anything on the said land or entered into possession; and that the deed to and obligation from Roy were simulated and fraudulent. This judgment was confirmed by the Court of Queen's Bench, Justices Monk and Cross dissenting.

Held, affirming the judgments of the courts below, that the evidence shewed a fraudulent scheme on the part of the defendants to obtain the goods of the plaintiff and to cheat him out of the price by inducing him to accept an inadequate security; and that under the circumstances the plaintiff was entitled to recover for such price. Henry, J., dissenting.

Taschereau, J.—The court should not reverse the findings on a question of fact of the two courts below, except under very unusual circumstances—*Hays v. Gordon*, L. R. 4 P. C. 337; *Gray v. Turnbull*, L. R. 2 H. L. 53; *Bell v. Corporation of Quebec*, 5 App. Cases 94; *Smith v. St. Lawrence*, L. R. 5 P. C. 308. He agreed, however, with the courts below on the facts.

Appeal dismissed with costs.

Black v. Walker.—8th March, 1886.

15. Sale of lumber—Acceptance of part—Right to reject remainder.

T. contracted for the purchase from D. of 200,000 feet of lumber of a certain size and quality, which D. agreed to furnish. No place was named for the delivery of the lumber, and it was shipped from the mills where it was sawed to T. at Hamilton. T. accepted a number of carloads at Hamilton, but rejected some because a portion of the lumber in each of them was not, as

Sale of Goods—Continued.

he alleged, of the size and quality contracted for. Held, affirming the judgment of the Court of Appeal for Ontario, Fournier and Henry, JJ., dissenting, that T. under the circumstances of the case had no right to reject the lumber, his only remedy for the deficiency being to obtain a reduction of the price or damages for non-delivery according to the contract.

Thomson v. Dymont.—xiii. 303.

16. Vendor and purchaser—Open and notorious sale—Actual and continued change of possession—R. S. O. c. 119, s. 5—Hiring of former owner as clerk.

The purchaser of the stock of a trader, where the change of ownership is open and notorious, may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may be "an actual and continued change of possession," as required by R. S. O. c. 119, s. 5. *Ontario Bank v. Wilcox*, 43 U. C. Q. B. 460, distinguished.

Kinloch v. Scribner.—xiv. 77.

17. Delivery—Non-acceptance by vendee—Return of goods to vendor—Rescission of contract—Re-sale.

H. doing business at Halifax, N. S., was accustomed to sell hides to J. L. of Pictou. Their usual course of business was for H. to ship a lot of goods consigned to J. L., and send a note for the price according to his own estimate of weight, etc., which was subject to a future rebate if there was found to be any deficiency. On July 14, 1884, a shipment was made by H. in the usual course and a note was given by J. L., which H. caused to be discounted. The goods came to Pictou Landing and remained there until August 5th, when J. L. sent his lighterman for some other goods and he finding the goods shipped by H., brought them up in his lighter. The next day J. L. was informed of their arrival and he caused them to be stored in the warehouse of D. L. where he had other goods, with instructions to keep them for the parties who had sent them. The same day he sent a telegram to H. as follows: "In trouble. Have stored hides. Appoint some one to take care of them." H. immediately came to Pictou and having learned what was done, expressed himself satisfied. He asked if he would take them away, but was assured by J. L. that they were all right and left them in the warehouse. On August 6th a levy was made, under an execution of the Pictou Bank against J. L., on all his property that the sheriff could find, but the goods in question were not included in the levy. On August the 12th J. L. gave to the bank a bill of sale of all his hides in the warehouse of D. L. and the bank indemnified D. L. and took possession under such bill of sale of the hides so shipped by H. and stored in said warehouse. In a suit by H. against the bank and D. L. for the wrongful detention of such goods:

Held, affirming the judgment of the court below, that the contract of sale between J. L. and H. was rescinded by the action of J. L. in refusing to take possession of the goods when they arrived at his place of business and handing them over to D. L. with direction to hold them for the consignor, and in notifying the consignor who acquiesced and adopted the act of J. L., whereby

Sale of Goods—Continued.

the property in and possession of the goods became re-vested in H. and there was, consequently, no title to the goods in J. L. on August 12th when the bill of sale was made to the bank.

Pictou Bank v. Harvey.—xiv. 617.

18. By agent of two firms—Goods of both principals—Single price
—Excess of authority.

See AGENT, 12.

19. Goods sold and delivered—Credit—Direction to jury—Withdrawal of evidence from jury—New trial.

See EVIDENCE, 42.

20. *Contract of sale—Particular chattel—Representation.*

McD. bought at auction, through an agent, a billiard table described in the auctioneer's advertisement as "a full size 6 pocket English billiard table made by Thurston," etc., and wrote to M. & Co., makers of billiard tables in Toronto, describing his table and asking terms of exchanging it for a new one of another style. On receiving the information asked, McD. wrote that he could not accept the terms offered. M. & Co. afterwards wrote the following letter :—

TORONTO, Oct. 2nd, 1886.

D. C. McDougall, Esq., Agent Halifax Banking Co., Antigonish.

DEAR SIR,—Your laconic reply to our letter of 24th instant to hand. We would drop the matter if it was not for an inquiry which we have just received from a private party in the far North-West who would like to purchase a good second-hand English table. We would therefore kindly ask you to make us your offer for the proposed exchange, and if we can possibly do it we will accept it. Give us as near a description as you can of your table, maker's name is essential, but as you have nothing with it but the billiard outfit (no life and pyramid balls and boards) you should not make your price too high, or a deal will be impossible. Awaiting your kind reply, we remain, yours truly,

SAMUEL MAY & CO.

To which McD. answered : I may just say I never saw our table yet, but am informed it is a very nice one, made by "Thurston" and very little the worse of wear, being in the private family of Sir Edward Kenny in his country residence near Halifax. This gentleman who purchased the table for us writes thus : "I got the 8 billiard balls and marker, and 19 cues, which is all that is needed for billiards. I am told the table is a great bargain, cost £200 in England, and is not much the worse for wear." The table is 6 x 12, and for particulars we would refer you to Jerry E. Kenny, Esq. or F. D. Clark, auctioneer, Halifax.

Yours truly,

D. C. McDougall.

M. & Co. then wrote accepting the offer and adding, "We trust that the English table is fully as represented; and if you are satisfied, you may ship it

Sale of Goods—Continued.

at once, with billiard balls, markers, 19 ones, cloth and what else there may be. In the meantime we will get up a $4\frac{1}{2}$ x 9 Eclipse Combination table in best style, and with outfits for pool, carom and pin pool games. Awaiting your early reply, we remain, dear sir,

Yours truly,

SAMUEL MAY & Co."

The table shipped by McD. on reaching Toronto was found to be an American made table with English cushions and worth only from \$15 to \$25. M. & Co. brought an action for the original price of the new table.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that McD. agreed to deliver to M. & Co. an English built table made by Thurston as described in his letter and having failed to deliver such a table he was liable to pay the full price of the one obtained from M. & Co.

Present.—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

May v. McDougall.—Feb. 25, 1890.—xviii. 700.

21. Non-delivery—Part of large parcel—Lien of unpaid vendor.

The defendant H. had over 4,000,000 feet of lumber in a yard in Rockland, Ont., and sold 1,500,000 through an agent to L. of Montreal on six month's credit, ratifying the sale by a letter to the owners of the yard as follows:

MONTREAL, 12th JANY., 1887.

MESSRS. W. C. EDWARDS & Co., ROCKLAND, ONT.

GENTLEMEN—You will please ratify Mr. Lemay's order for one million feet 3 mill culls 8-13 feet and 493,590 feet 3 mill culls 14-16 feet sold to Mr. William Little, f. o. b., of barges with option to draw them from the piles, if he wants some during winter.

Yours truly,

(Sd.)

N. HURTEAU ET FRÈRE.

A few days after the sale the agent gave an order on the owners of the yard for delivery of the lumber to L. which order was accepted by the owners. L. had given a six month's note for the price of the lumber and just before it matured he asked defendants to renew, which they refused, and on L. saying that he could not pay defendant replied that he must keep his lumber, whereupon he was informed by L. of his agreement with the plaintiff made about a month after the purchase from defendant by which he pledged to plaintiff the warehouse receipt for the lumber as collateral security for advances to him by plaintiff. On the trial of an interpleader issue to determine the title to this lumber it was shown by the evidence that the quantity sold to L. had never been separated from the defendant's lot in the yard and that defendant had always kept it insured considering it his until paid for.

Held, affirming the judgment of the Court of Appeal, Strong and Gwynne, JJ., dissenting, that the property in the lumber never passed out of H. the defendant.

Present: Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Ross v. Hurteau.—Dec. 11, 1890.—xviii. 713.

[The Privy Council refused leave to appeal.]

Sale of Goods—Continued.**22. Sale by weight—Contract, when perfect—Damage to goods before weighing—Possession retained by vendor, effect of—Depositary — Arts. 1063, 1064, 1235, 1474, 1710, 1802, C. C.**

Held, *per* Ritchie, C.J., Strong and Fournier, JJ., affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that where goods and merchandise are sold by weight the contract of sale is not perfect, and the property in the goods remains in the vendor and they are at his risk until they are weighed, or until the buyer is in default to have them weighed; and this is so, even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction.

Held, also, *per* Ritchie, C.J., Fournier and Taschereau, JJ., that where goods are sold by weight, and the property remains in the possession of the vendor the vendor becomes in law a depositary, and if the goods while in his possession are damaged through his fault and negligence he cannot bring action for their value.

Per Patterson, J., *dubitante*, whether there was sufficient evidence of acceptance in this case to dispense with the writing necessary under Art. 1235, C. C. to effect a perfect contract of sale.

Ross v. Hannan.—xix. 227.

23. Partners—To whom credit given—Entries of goods on previous dealings—Evidence of partnership.

See EVIDENCE, 68.

Sale of Lands—Warranty—Effect of timber limits—Civil Code—Arts. 1515 and 1518—Sale en bloc—Deficiency.

By a deed executed October 22nd, 1866, for the purpose of making good a deficiency of fifty square miles of limits which respondents had previously sold to appellants, together with a saw mill, the right of using a road to mill, four acres of land, and all right and title obtained from the Crown to 255 square miles of limits for a sum *en bloc* of \$20,000, the respondents ceded and transferred "with warranty against all troubles generally whatsoever" to the appellants, two other limits containing 50 square miles. In the description of the limits given in the deed, the following words are to be found: "Not to interfere with limits granted or to be renewed in view of regulations." The limits were, in 1867, found in fact to interfere with anterior grants made to one H.

Held, that the respondents having guaranteed the appellants against all troubles whatsoever, and at the time of such warranty the said 50 miles of limits sold having become, through the negligence of respondent's auteurs, the property of H., the appellants were entitled, pursuant to Art. 1518, C. C. (P.Q.), to recover the value of the limits from which they had been evicted proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover pur-

Sale of Lands—Continued.

suant to Art. 1515, C. C., for all improvements, but as the evidence as to proportionate value and damages was not satisfactory, it was ordered that the record should be sent back to the court of first instance, and that upon a report to be made by experts to that court on the value of the same at the time of eviction, the case to be proceeded with as to law and justice may appertain.

Per Strong and Gwynne, JJ., dissenting.—That the only reasonable construction which could be put upon the words "with warranty against all troubles generally whatsoever" in the deed, must be to limit their application to protecting the assignee of the licenses against all claims to the licenses themselves, as the instruments conveying the limits therein described, and not as a guarantee that the assignee of the licenses should enjoy the limits therein described, notwithstanding that it should appear that they were interfered with by a prior license. But, assuming a different construction to be correct, there was not sufficient evidence of a breach of the guarantee. [Reversed by Privy Council, 9 App. Cas. 150.]

Dupuy v. Ducondu.—vi. 425.

2. *Promise of sale—Construction of—Condition precedent—Misc en demeure—Arts. C. C. 1022, 1067, 1478, 1536, 1537, 1538, 1550.*

On the 7th December, 1874, T. G., by a promise of a sale, agreed to sell a farm to D. M., then a minor, for \$1,200—of which \$500 were paid at the time, balance payable in seven yearly instalments of \$100 each, with interest at 7 per cent. D. M. was to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed of sale, if instalments were paid as they became due, "but if, on the contrary, D. M. fails, neglects, or refuses to make such payments when they come due, then said D. M. will forfeit all right he has by these presents to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid, and which hereafter may be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee." After D. M. became of age he left the country without ratifying the promise of sale; he paid none of the instalments which became due, and in 1879, T. G. regained possession of the farm. In October, 1880, D. M. returned and tendered the balance of the price, and claimed the farm.

Held, reversing the judgment of the court below, Strong and Taschereau, JJ., dissenting, that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately, on the failure of the performance of the condition, *ipso facto*, changed the relation of the parties from vendor and vendee to lessor and lessee.

Grange v. McLennan.—ix. 385.

Sale of Lands—Continued.

3. *Vendor and purchaser—Verbal agreement—Subsequent deed—Alleged fraudulent representation by vendor—Refusal of judge to postpone hearing.*

W. (plaintiff) being desirous of securing a residence, entered into negotiations with S. (defendant) to purchase a house which defendant was then erecting. W. alleged that the agreement was, that he should take the land (2½ lots) at \$400 a lot of fifty feet frontage, and the materials furnished and work done at its value. In August, 1874, a deed and mortgage were executed, the consideration being stated in both at \$5,926. The mortgage was afterwards assigned to the M. & N. W. L. Co. W. alleged in his bill, that S., in violation of good faith, and taking advantage of W.'s ignorance of such matters, and the confidence he placed in S., inserted in the mortgage a larger sum than the balance due as a fair and reasonable market value of the lands, and of what he had done to the dwelling house and other premises, and he prayed that an account might be taken of the amount due. S. repudiated the allegation of fraud, and alleged that W. had every opportunity to satisfy himself, and did satisfy himself, as to the value of what he was getting; that he had told the plaintiff he valued the land at \$2,000, and that in no way had he sought to take advantage of the plaintiff. S. was unable to be present at the hearing, and applied for a postponement, on the grounds set forth in an affidavit, that he was a material witness on his own behalf, and that it was not safe for him, in his state of health, to travel from Ottawa to Winnipeg. Dubuc, J., refused the postponement, on the ground that the court was only asked now to decree that the account should be opened and properly taken, and the amount ascertained, which would be done by the master if the court should so decide, and that the defendant would then have an opportunity of being present, and that he was not necessarily wanted at the hearing; and, as the result of the evidence, made a decree in accordance with the contentions of the plaintiff, and directed an account to be taken.

The Chief Justice of the Supreme Court, under s. 6, of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being known that there were then only two judges on the bench in Manitoba, the plaintiff (Chief Justice) and Dubuc, J., from whose decree the appeal was brought.

Held, that under the circumstances, the case ought not to have been proceeded with in absence of appellant, and without allowing him the opportunity of giving his evidence.

Per Ritchie, C.J., and Strong and Gwynne, JJ., that on the merits there was no ground shown to entitle the plaintiff to relief.

Per Ritchie, C.J., and Strong, J., that the bill upon its face alleged no ground sufficient in equity for relief, and was demurrable.

Schultz v. Wood.—vi. 585.

4. *Offer to sell—Acceptance on completion of title—Specific performance.*

On the 26th January, 1882, McI. wrote to H. as follows:—"A. McI. agrees to take \$35,000 for property known as McM. block. Terms—one-third cash,

Sale of Lands—Continued.

balance in one year at eight per cent. per annum. Open until Saturday, 28th, noon." On the same day H. accepted this offer in the following terms:—"I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., 22 D. block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance, the Court of Queen's Bench (Man.) decreed that H. was entitled to have the agreement specifically performed.

Held, Ritchie, C.J., and Fournier, J., dissenting, that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties.

McIntyre v. Hood.—ix. 556.

5. Sale by agent—Obtaining conveyance from pretended purchaser—Trustee and cestui que trust—Laches.

In 1874, the plaintiff, W. J. T., before leaving Canada, conveyed certain lands, in which he had an interest as assignee of a contract to purchase, to his brother, G. T., one of the defendants. In April, 1851, G. T., in anticipation of a suit which was afterwards brought by one C. against W. J. T., in relation to the lands in question, without the knowledge of his brother, re-assigned the property to him, and having paid the balance of the purchase money, a deed of the lot issued at G. T.'s request to W. J. T., as such assignee. In October following a power of attorney was sent to, and executed by, W. J. T. who was then in California, in favour of G. T., to enable him (G. T.) to "sell the land in question, and to sell or lease any other lands he owned in Canada." In 1856, G. T. conveyed the property to W., the respondent, who had acted as solicitor for W. J. T., and had full means of knowing G. T.'s position and powers, for an alleged consideration of \$1,000, and W. immediately re-conveyed to G. T. one-half of the land for an alleged consideration of \$200. In 1873 W. J. T. returned to Canada, and in January, 1874, filed a bill impeaching the transactions between his brother and W., seeking to have them declared trustees for him.

Held, reversing the judgment of the Court of Error and Appeal, and affirming the decree of Vice-Chancellor Proudfoot, Strong, J., dissenting, that W. J. T. was the owner of the lands in question; that he had not been debarred by laches or acquiescence from succeeding in the present suit, and that the transactions between G. T. and W. should be set aside.

Taylor v. Wallbridge.—ii. 616.

6. Vendor and purchaser—Contract for sale of land—Bill for rescission of, on ground of fraud—Or for compensation for deficiency—Contract perfected by conveyance.

The Bill of Complaint was filed by the appellant (plaintiff) by his next friend against the respondents (defendants) in March, 1876, and made a case of actual fraud committed by Robert A. Murta, deceased, of whose will the defendants were executors.

Sale of Lands—*Continued.*

On the 29th of June, 1871, Murta conveyed to the appellant a piece of land described as containing by admeasurement one acre, "being the north-west square acre of lot number thirteen in the tenth concession of the said township of Reach, and which may be further known as being village lot number one on the registered plan of the village of Greenbank, save and except one quarter of an acre, more or less, off the south end of said lot number one, sold to one Henry Hall."

The whole consideration was \$1,600, of which \$700 was paid at the time of the sale, and a mortgage given for \$900.

The appellant contended that the evidence established that Robert A. Murta, in the negotiations which resulted in the sale to the appellant, represented that he was the owner of the land running from the east side of the travelled road to a high board fence which he then pointed out to the appellant as the rear boundary of the property he was offering to her for sale; that the appellant believed the statements and representations of the said Murta, and on the faith thereof purchased the property, believing she was getting the land Murta had so pointed out, and that the land so purchased extended to the high board fence before mentioned, and included the orchard and yard in the evidence referred to. The evidence showed that the said Robert A. Murta was not the owner of lot number one on the registered plan in the village of Greenbank, and that the said village lot number one was not identical with the north-west square acre of lot thirteen in the tenth concession of Reach; that Robert A. Murta was well aware at the time he made such representations, he was not the owner of a portion of the said lands he pointed out, but that the same had been claimed by one Ianson, whose title thereto he had acknowledged; and she prayed (1) That the contract might be rescinded and set aside on the ground of fraud; or (2) That compensation might be awarded for the alleged deficiency in the quantity of land.

Proudfoot, V.C., before whom the case was tried, found that there was no case of fraud proved as against Murta, and that the contract could not be set aside; but he thought that Murta had agreed to sell an acre to be measured from the travelled road, and that he did not own a part of the land which he agreed to convey, and decreed compensation for the deficiency to be made by the defendants to the plaintiff.

The Court of Appeal for Ontario agreed with the finding of the Vice-Chancellor, so far as any case of fraud was concerned, but differed from the conclusion of the Vice-Chancellor as to compensation, holding that after a contract had been perfected by conveyance a bill for compensation on account of defects cannot be maintained; that after the conveyance the purchaser is confined to his remedy upon the covenants, or, in a proper case, where he applies promptly, to a rescission of the contract, *Follis v. Porter*, 11 Grant, 412. If, therefore, the Vice-Chancellor was of opinion that it would be inequitable to decree a rescission, he ought to have dismissed the bill. But such a decree was not warranted by the evidence.

On appeal to the Supreme Court of Canada, *Held*, that the judgment of the Court of Appeal for Ontario should be affirmed. (Henry, J., dissenting.)

Appeal dismissed with costs.

Penrose v. Knight.—7th May, 1879.

Sale of Lands—Continued.

7. Statute of frauds—Parol evidence—Trust account.

The bill sought an account of the rents and purchase money received by the defendant upon the lease and sale of lot 18 containing 100 acres of land, in which (it alleged) the plaintiff's father (now dead) and the defendant his brother were jointly interested. It appeared that the deceased had for years assisted the defendant in improving and cultivating this lot, on which they lived. The defendant had spoken of his brother having a deed of 50 acres of the place on which he lived. It was shown that the defendant, who had the fee of the whole lot, had, in 1850, made a deed to his brother of some land, which the plaintiff insisted was 50 acres of this lot; but this deed could not be produced owing to its having been either lost or destroyed. The defendant denied this, but admitted having given his brother a deed of the adjoining lot 17 for the purpose of enabling him to vote. Lot 17 contained 120 acres and the defendant's only interest in it was, that the person from whom he purchased lot 18, had cleared a few acres on it, and the Inspector of Clergy Reserves reported that he claimed the lot, but he was never recognized as a purchaser, and never made any payment on account of the land. The deed to the deceased had never been registered. In 1856, the defendant made a lease of lots 17 and 18 to one F., which transaction was negotiated by the deceased, and in 1875, the defendant sold lot 18 to F. with the concurrence of the deceased. The defendant swore that the deceased had never made any claim to the rent, and denied the whole case attempted to be made by the plaintiff, but his evidence was not consistent or corroborated.

The Court of Appeal for Ontario **Held**, affirming the judgment of Spragge, C., (26 Gr. 18), that the evidence showed that the deceased was the owner of half of lot 18; that the whole of the land having been sold with his assent, and the whole of the purchase money received by the defendant, it was so received for their joint use and benefit, and that the plaintiff was therefore entitled to an account. (*See* 4 Ont. App. R. 68.)

On appeal to the Supreme Court of Canada, **Held**, *per* Ritchie, C.J., and Fournier and Henry, JJ.—That the evidence sufficiently established a deed by defendant to his brother of one-half of lot 18 for valuable consideration, that the understanding between the brothers was that when the land should be sold, a sale should be effected for their joint benefit, and that the land was sold to F., by defendant, with the knowledge and concurrence of his brother and for the benefit of both. Therefore the defendant should account to his brothers' representatives for his brother's share, as money had and received.

Per Strong, Taschereau and Gwynne, JJ.—Although the evidence sufficiently established a deed for valuable consideration by defendant to his brother of one-half of lot 18, there was not sufficient evidence of either trust or contract as regards the payment of any portion of the purchase money received by the defendant, on the sale made by him, to entitle the plaintiff to any relief.

The court being equally divided, the appeal was dismissed without costs.

Curry v. Curry.—13th March, 1890.

Sale of Lands—Continued.

8. *Vendor and purchaser—Contract of sale—Rescission of—False representations—Fraud—Joint liability of parties who received consideration.*

The plaintiff May filed a bill to set aside the sale of a parcel of land in the Parish of St. John, described in the deed to May, as being block No. 55, containing fifty-two lots according to plan registered, alleging conspiracy and false and fraudulent misrepresentations. The sale to May was effected under the following circumstances:—McLean and McArthur were interested in a contract with the Bishop of Rupert's Land for the purchase of three blocks of land containing fifty-two lots each, and McLean with McArthur's consent and sanction came to Toronto to sell the land. In Toronto one Gilmour met McLean, and agreed with him to find purchasers, Gilmour to get any money over \$100 per lot. Gilmour thereupon solicited May to purchase the land, stating that he had secured the lots for a very short time at \$150 per lot, but that right was contingent upon his taking all the lots contained in the three blocks offered for sale, and representing that one block of land in question was facing McPhillips street. May said he would purchase, provided Gilmour and one Drynan and himself were co-partners or joint investors in the three blocks. An agreement was signed to that effect, but it was ultimately agreed that May should pay for and take the conveyance to himself of block 33 at \$150 per lot. Gilmour filled up a conveyance which had been signed in blank by McLean of lot 35 from McArthur to May, and induced him to accept it without further inquiry by producing and delivering a guarantee from McLean, that he had a power of attorney from McArthur, and that the plan was registered and title perfect. May paid \$5,200 cash and gave a mortgage for \$2,500. Gilmour got \$2,500 of this purchase money. May subsequently ascertained that the block of land in question did not front on McPhillips street, and that Gilmour and Drynan were not joint investors with him, and that statements in the guarantee were false. By his bill May prayed that the sale be set aside, the portion of the purchase money already paid be re-paid to him, and that the mortgage given to secure payment of the remainder be cancelled.

Held, reversing the judgment of the Court of Queen's Bench in equity, Manitoba, that the false and fraudulent representations made by Gilmour and McLean, entitled May to the relief prayed for against McArthur, McLean and Gilmour jointly and severally.

Appeal allowed with costs.

May v. McArthur.—20 C. L. J. 248; 4 C. L. T. 336.—20th May, 1884.

9. *Hypothecary action against sub-purchasers—Acknowledgment of amount due signed by original vendor in error—Judgment against original purchaser res inter alios acta as regards sub-purchasers when action brought against former after purchase and registration of deed by latter—Variation of original promise of sale by subsequent deed—Evi-*

Sale of Lands—Continued.

dence of notary not admissible to contradict deed—Bonus on transfer of timber limits payable by purchaser when agreement silent.

This was an appeal from a judgment of the Court of Queen's Bench, reversing a judgment of the Superior Court, at Quebec, rendered on the 8th of July, 1882, in an hypothecary action instituted by Dubuc, the appellant, against the respondents. By its judgment the Superior Court declared certain real estate, the property of the respondents, hypothecated in favour of the appellant "for the capital, interest and costs mentioned in his declaration, amounting to the sum of \$5,250 currency, with interest from the 7th of July, 1880, at the rate of eight per cent. per annum, and costs of suit, and *frais des pièces*," condemned the respondents to surrender the real estate in question to be judicially sold upon the curator to be named to the surrender, to the end that the appellant, out of the proceeds of the sale, might be duly paid, unless the respondents rather chose, within fifteen days of the service upon them of the judgment, to pay to the appellant the said sum of \$5,250 interest and costs.

The action in the Superior Court originated under the following circumstances:

By memorandum of sale, bearing date the 31st of July, 1872, and deposited in the office of Mr. Clapham, N.P., on the 10th September, of the same year, Dubuc, the appellant, sold to one Connolly "all the limits belonging to the said Dubuc, on the Jacques Cartier River, containing about 170 miles, together with all the square timber, logs and firewood made on the said river, 200 pieces of which are now at St. Sauveur, and also the property purchased from O'Sullivan, Buggy and Wolf, with the islands, now belonging to the said Dubuc . . . for the sum of \$35,570 to be paid," as set out in the memorandum. It was further provided that a deed of sale should be prepared as soon as possible.

On the 21st of November following, the formal deed of sale from Dubuc to Connolly above mentioned was executed before a notary, the real estate conveyed being by it hypothecated in favour of the vendor for the balance of the purchase price.

The deed of the 21st of November made mention of the memorandum of sale as follows: "The present sale and conveyance is thus made for and in consideration of the price and sum of \$35,087.37, lawful current money of Canada, on account and in part payment whereof the said Charles Alexandre Dubuc did and doth hereby acknowledge to have received at and before the execution of these presents the sum of \$4,095, of which said sum of money the sum of \$3,995 was employed in payment of wages to labouring men for work done and performed on part of the property hereby sold or intended so to be due by him, the said vendor, previous to the 31st day of July, now last past, the day on which the same was sold by the said Charles Alexandre Dubuc to the said James Connolly, as appears by the memorandum of sale *sous seing privé* made between them on the said last above mentioned day, the price and terms of payment in the said memorandum of sale having been changed in the present deed of sale made in pursuance thereof."

Sale of Lands—Continued.

The Wolfe property was not mentioned in this deed of the 21st November, and one of the questions arising between the parties was, as to whether the deed was intended to vary the agreement of the 31st July, 1872, so far as related to this property and the price thereof.

On the 4th of June, 1878, by deed, the respondents purchased from Connolly part of the property he had acquired from Dubuc, and on the 14th of the same month registered their deed of purchase.

In February, 1879, some months after the registration of the conveyance to the respondents, Dubuc sued Connolly, in the Superior Court, at Quebec, to recover the sum of \$5,000, balance alleged to be due, on the price specified in the deed of sale above mentioned. To this action Connolly appeared and pleaded payment, and, in the result, the Superior Court, presided over by Mr. Justice Stuart, dismissed his plea, and entered judgment against him for the \$5,000 demanded, with interest at eight per cent., from the 20th of February, 1879, and costs.

Failing to obtain payment from Connolly, the appellant Dubuc, in July, 1880, began the present action, to which the respondents pleaded payment by Connolly and consequent extinction of the hypothec, and further that their purchase was made in good faith, and in reliance upon a receipt from Dubuc, which their vendor held. Mr. Justice Stuart, before whom the case was heard, adhered to his previous decision.

The Court of Queen's Bench, Tessier and Baby, JJ., dissenting, reversed the decision of the Superior Court, and from that judgment this appeal was taken.

The principal points presented for decision were :

1. Had the judgment obtained by Dubuc against Connolly the effect of *res judicata* ?

2. On the 2nd September, 1876, Dubuc signed a statement of account, acknowledging that the purchase price then due by Connolly to him was \$1,442.33. The respondents contended that Dubuc could not go behind this representation, their purchase being made subsequently to it ; but the appellant alleged that he had only signed such statement on condition that he was not to be bound by it, if incorrect, and that in any event it was not proved that it had ever been brought to the notice of the respondents.

3. On the 5th December, 1872, Connolly paid the Commissioner of Crown Lands, as the transfer bonus on the limits sold by Dubuc, the sum of \$1,344. It was necessary to decide whether Dubuc, the vendor, or Connolly, the purchaser, was legally bound to pay this bonus, the agreement being silent as regarded it.

4. As respects the property mentioned in the agreement of the 31st July, 1872, as the Wolf property, the price of this property was fixed by the agreement at \$1,350, but it did not then belong to Dubuc. Connolly, after the agreement on the 21st November, 1872, paid this amount to the owner, and he contended that although the property was omitted from the deed of the 21st November, 1872, the two documents should be read in connection with each

Sale of Lands—Continued.

other, and the omission did not relieve Dubuc from the liability to carry out his promise of sale, or to be charged with the price when paid by Connolly.

5. The notary who made the agreement of the 31st July, 1872, and the deed of the 21st November, 1872, being called as a witness, stated: "I have no doubt in my own mind that this lot (Wolf) was included in the sale. It was not put in this intentionally to avoid a repetition of the deed, and Mr. Hall undertook to make the assignment direct to Mr. Connolly, on getting paid out of that purchase money, which was part of the sale." The appellant contended that this evidence could not be received to contradict or vary the terms of a valid instrument.

The Supreme Court of Canada, *Held*, 1. Affirming the judgment of Casault, J., who decided the question on demurrer, 7 Q. L. R. 43, and the unanimous judgment of the Court of Queen's Bench sustaining Casault, J.'s judgment, that the judgment against Connolly was *res inter alios acta* as regarded the respondents and not binding on them.

2. That there was no evidence in the record to sustain the contention that the acknowledgment of account signed by Dubuc was ever brought to the notice of respondents before they purchased, and therefore the appellant might properly show it had been signed in error.

3. Reversing the judgment of the Court of Queen's Bench, that the bonus of \$1,344 paid to the Commissioner of Crown Lands, was a payment which the purchaser of the limits was legally bound to make, and which, therefore, could not be charged against the seller, Dubuc.

4. Reversing the judgment of the Court of Queen's Bench, that the appellant was not properly chargeable with the amount paid for the Wolf property, an entirely new contract having been substituted by the deed of the 21st November, 1872, for the promise of sale of the 31st July, 1872.

5. That the evidence of the notary could not be received to contradict the deed of the 21st November, 1872.

Appeal allowed with costs. Henry, J., dissenting.

Dubuc v. Kidston.—23rd June, 1884.

10. *Vendor and purchaser—Specific performance—Contract not signed by vendor, but subsequently admitted by his letters—Statute of frauds.*

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued "*Re S.*'s purchase we would like to close this." And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. . . . Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and on a subsequent occasion: "*Re S.*'s purchase. Herewith

Sale of Lands—Continued.

please receive deed for approval," and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract."

Held, affirming the judgment of the courts below, 28 Grant 207, 8 Ont. App. R. 161, that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds.

O'Donohoe v. Stammers.—xi. 358.

11. Agreement to assign mortgage in part payment—Construction of—Second mortgage, not a fulfilment of.

W. agreed to sell to L. and L. agreed to purchase a messuage and land for \$4,800, and L. agreed to give in part payment for the land a mortgage made by one Rorison on another parcel for the sum of \$2,500. The mortgage offered in fulfilment of this agreement was not a first mortgage—a mortgage of the legal estate—but was subsequent to another mortgage for a large amount. W. refused to accept the mortgage, and in an action on the agreement to recover the purchase money and interest represented by such mortgage it was admitted that the mortgage was not a first mortgage upon the land described in it, and that no notice had been given to the vendee of its being a second mortgage, nor had there been any waiver of his right to demand a first mortgage. On the contrary he had asked, "Is this a negotiable instrument?" and was told "It is all right."

Held, affirming the judgment of the Court of Queen's Bench of Manitoba, that under the terms of the agreement the plaintiff was entitled to a good marketable mortgage—that is a first mortgage upon the real estate.

Per Ritchie, C.J. The words "negotiable instrument" did not mean a negotiable instrument in the nature of a promissory note, but an instrument which could be taken into the market as a saleable instrument.

Per Strong, J. An agreement to assign a mortgage on land by way of absolute transfer or sale, or, as in the present case, to assign a mortgage on land in payment, or part payment, of other land sold by the proposed transferee to the proposed transferor, is a contract of which a Court of Equity would decree specific performance, and in carrying out a decree for specific performance, the purchaser is always entitled to a reference as to title whatever may be the nature of the property which is the subject of the sale, the right to a reference of title not being confined to sales of real estate. A Court of Equity would not compel a party who agreed to purchase a mortgage on land simply to take any other than a mortgage of the legal estate free from all prior incumbrances. The title in such a case which the vendor of the mortgage impliedly undertakes to give is a good marketable title, which means a title to a mortgage of a legal estate in possession, just as the vendor who sells land without saying more impliedly agrees to show a good title to both the mortgage debt, the money secured by the mortgage, and to the security holden for the debt, the land; and he can only show the latter by proving the legal estate free from all incumbrances has passed under the mortgage. The same rule should prevail in a court of law, the construction of contracts being the same in both jurisdictions. If the agreement had been executed the remedy

Sale of Lands—Continued.

of the plaintiff would have been upon any covenants which the transfer might have contained, or, if still *in fieri*, if it could be shown there had been any waiver of the right to call for a good title, the plaintiff might be concluded; and this might have been a consequence of distinct notice to him during the negotiations that the mortgage was upon the equity of redemption only, but there was no proof of any such waiver or acceptance of notice from which it might be inferred.

Per Henry, J.—When it was stipulated in general terms that a mortgage was to be assigned the agreement could only be performed by assigning a first mortgage.

Appeal dismissed with costs.

Lynch v. Wood.—23rd June, 1884.

12. *Agent, sale by—Duty of, under instructions to sell lands—Vendor and purchaser—Contract not binding under statute of frauds—Commission—Mis-trial—Reduction of verdict.*

About the first day of January, 1882, the appellants, who were real estate agents or brokers in the city of Winnipeg, received verbal instructions from the respondents to sell part of the south half of lot 12, in the Parish of Kildonan, containing 145 acres, at \$275 an acre, the whole price amounting to \$39,875; on the terms of \$5,000 cash, \$12,000 on a mortgage then existing on the property, and the balance cash in twenty days from date of sale.

On the 18th day of said month of January, the appellants sold the land at the said price, receiving from the purchasers the sum of \$5,000 as a deposit on account of the purchase money, and giving therefor a receipt.

On the day the appellants sold the said land and received the said \$5,000 from the purchasers, Henry F. Champion, one of the respondents, called at the office of the appellants, who informed him of the sale, and the said Champion then demanded and received from the appellants the \$5,000, and gave the appellants a receipt therefor.

On the 14th day of the said month of January, the appellants received instructions from the respondents to sell 10 acres, being another part of said south half of lot 12, Parish of Kildonan, east of Main street in the city of Winnipeg, at the price of \$1,500 per acre.

On the 15th day of January, the appellants, as such agents of the respondents, sold the said 10 acres to one F. W. Barrett (acting for the syndicate who had purchased the 145 acres) who agreed to purchase at the price at which the appellants had been authorized to sell, but the formal agreement was closed by said Barrett with Henry F. Champion, one of the respondents, to whom Barrett paid \$1,500 on account of the purchase money of \$15,000, and Champion gave to said Barrett a receipt for the amount so paid.

Prior to the expiration of the twenty days, within which the balance of the purchase money on the 145 acre parcel was to be paid, the purchasers discovered that the patent for 75 or 80 acres thereof (being what is known as the outer two miles thereof) had not been issued, and the respondents

Sale of Lands—Continued.

were without title to such portion; and on account of this want of title in the respondents the purchasers refused to complete their purchase, and from the absence of a writing signed by them they could not be compelled to do so.

The appellants brought an action for commission upon the entire purchase money, \$1,365.

The respondents set up the defence that the appellants promised to sell the said lands, and to complete such sale by preparing the necessary agreement in writing to make a binding contract with such person or persons as should become purchasers of the lands.

The case came on for trial before a jury who followed the charge of the Chief Justice, and found a verdict in favour of the plaintiffs for the full amount of their claim, thereby giving them $2\frac{1}{2}$ per cent. upon the entire purchase money of both parcels of land. This verdict was moved against successfully, and judgment was rendered directing that the verdict should be reduced to \$125, being commission at the rate of $2\frac{1}{2}$ per cent. on the \$5,000 actually paid, or, in the alternative, that there should be a new trial without costs, the plaintiffs to make their election between the two alternatives within 20 days.

On appeal to the Supreme Court of Canada, *Held, per Ritchie, C.J., and Fournier and Taschereau, JJ.*, that there had been a mis-trial, owing to certain matters which ought to have been submitted to the jury, not having been submitted by the judge with proper directions, matters in reference to the nature of the terms upon which the appellants were employed, the question whether the sale went off through the neglect of the appellants to take a writing binding the purchasers, or whether it went off by reason of the vendors not being able to complete the title, or because they were unwilling to do so.

The order for a new trial should be affirmed, the plaintiffs to have the alternative, to be exercised within 20 days after service of the order in appeal; of reducing his verdict to the \$125.

Per Henry, J.—It was the duty of the appellants to take from the purchasers a binding agreement under the statute: and having neglected to do so, they were not entitled to any compensation.

Per Strong, J., dissenting.—The appellants did all they were bound to do, and earned their commission by finding the purchasers, and did nothing and omitted nothing which amounted to misfeasance or nonfeasance disentitling them to the commission which they had earned.

McKenzie v. Champion.—22nd June, 1885.—xii. 649.

13. Authority to deliver deed and receive purchase money—Agent exceeding authority—New agreement.

See AGENT, 11.

14. *Contract for sale of land—Suit for rescission of—Fraudulent misrepresentation—Evidence.*

Where the court below dismissed the plaintiff's bill praying for the rescission of an executed contract, *Held*, that a clear case of fraud must be

Sale of Lands—Continued.

established to obtain the rescission of an executed contract, and the allegations of fraud made by the plaintiff being uncorroborated and contradicted in every particular by the defendant, neither the court below nor the court in appeal would be justified in rescinding the contract in question. Henry, J., dissenting, on the ground that the evidence bore out the allegations of fraud.

Appeal dismissed with costs.

Hutchinson v. Calder.—23rd June, 1885.

15. Sale under power in a mortgage after foreclosure.

See MORTGAGE, 15.

16. Sale of lots by plan—Lanes shown on plan—Subsequent acceptance of conveyance according to different plans.

The city of Toronto offered land for sale, according to a plan showing one block consisting of five lots each, about 200 feet in length running from east to west bounded north and south by a lane of the same length, and east by a lane running along the whole depth of the block and connecting the other two lanes. South of this block was a similar block of smaller lots, ten in number, running north and south 120 feet each. The lane at the east of the first lot was a continuation, after crossing the long lane between the blocks, of lot No. 10 in the second block. The advertisement of sale stated that "lanes run in rear of the several lots." M. became the purchaser of the first block, and C. of lot 10 in the second. Before registry of the plan M. applied to the City Council to have the lane at the east of the block closed up and included in his lease which was granted. C. then objected to taking a lease of his lot with the lane closed, but afterwards accepted a lease which described the land as leased according to plan 380 (the plan exhibited at the sale) and plan 352 (which showed the lane closed), and he brought an action against the city and M. to have the lane re-opened.

Held, affirming the judgment of the court below, that C. having accepted a lease after the lane was closed, in which reference was made to said plan 352, was bound by its terms and had no claim to a right of way over land thereby shown to be included in the lease to M.

Held, also, *per* Gwynne, J., that under the contract evidenced by the advertisement and public sale C. acquired no right to the use of the lane afterwards closed.

Carey v. City of Toronto.—April 9, 1886.—xiv. 172.

17. Will—Devisee under—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under—Conveyance by purchaser at sale under decree—Assignment of mortgage—Statute confirming title.

A. M. died in 1838, and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the said real estate which were subsequently foreclosed, but no sale was made under the decree in such suit.

Sale of Lands—*Continued.*

In 1841 the mortgages and the interest of the mortgages in the foreclosure suit were assigned to one J. B. U., who, in 1849, assigned and released the same to M. M.

In 1841 M. M., the administrator with the will annexed of the said A. M., filed a bill in chancery for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor in Council, under a statute of the Province, for leave to sell the same, which was refused on the ground that such leave could not be granted for the sale of a particular part of the estate, and if the whole estate were sold and there should be a surplus, there would be no mode of apportioning such surplus among the devisees. A decree was made in this suit and the lands sold, the said M. M. becoming the purchaser. She afterwards conveyed said lands to the commissioners of the lunatic asylum, and the title therein passed, by various Acts of the Legislature of Nova Scotia, to the present defendants. A statute having been passed in 1874 confirming the title to the said lands in the Commissioner of Public Works and Mines, M. K., devisee under the will of A. M. brought an action of ejectment against the Commissioner of Public Works and Mines and the resident physician of the lunatic asylum which was built on said land, and in the course of the trial contended that the sale under the decree in the chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor in Council. The validity of the mortgages and of the proceedings in the foreclosure suit were also attacked. The action was tried before a judge without a jury, and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that even if the sale under the decree in the chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, and the plaintiff, therefore could not recover in an action of ejectment.

Semble, that such sale was not invalid, but passed a good title. Henry, J., *dubitante*.

Held, also, that the statute c. 36, s. 47 R. S., 4th series, vested the said land in the defendants, if they had not a title to the same before. Henry, J., *dubitante*.

Appeal dismissed with costs.

Kearney v. Creelman.—17th February, 1886—xiv. 33.

18. *Warranty against charges and incumbrances—Promise to pay without reserve, by subsequent deed, with knowledge of assessments—Interest, agreement as to compensation.*

On the 28th June, 1877, the appellants entered into an agreement before Hunter, N. P., by which, without any reserve, they acknowledged to owe, and promised to pay certain sums of money amongst others to Mrs. L., transferee of one of the vendors, who, on the 3rd April, 1875, sold the Windsor Hotel property in Montreal to the appellants, and by the same deed Mrs. L. agreed

Sale of Lands—Continued.

to assist the appellants, in obtaining a loan of \$350,000, and to relinquish the priority of her hypothec for her share on the property, to extend to six years the period for the payment of the balance due her, waiving also any right to interest until the appellant's company had an available surplus after paying interest and insurance in connection with the new loan. Subsequently, on 15th June, 1880, Mrs. L., by notarial deed, transferred to the respondent the balance alleged to be due her under the deed of the 28th June, 1877, and the respondent brought an action to recover this balance with interest from 1st July, 1877, to the 15th December, 1885, date of the action. To this action the appellants pleaded, *inter alia*, that under the deed of the 28th June, 1877, interest could be demanded only from the 1st July, 1881, the secretary of the company having on said date testified for the first time there was an available surplus; and also that both principal and interest were compensated by the sum of \$1,901.70 paid the city for assessments imposed under 42 and 43 V. c. 53, (P.Q.), for the cost of public improvements made in the vicinity of the property prior to the sale of the property to the company in 1875. The assessment rolls originally made for these improvements were set aside by two judgments in 1876 and 1879. Held, affirming the judgment of the court below, that under the circumstances the respondent could not be said to be the *garant* of the purchasers of the said property, and therefore he was entitled to the payment of the balance alleged to be due under the deed of the 28th June, 1877, notwithstanding any claim the appellants might have against their vendors under the general warranty stipulated in the deed of purchase of April, 1875.

Held, also, that by the terms of the deed of the 28th of July, 1877, interest could be recovered only from the 1st of June, 1881.

Windsor Hotel Co. v. Cross.—xii. 624.

19. *Voluntary payment by purchaser—Lien of third party—Application of proceeds of sale—Interpleader act—Lands taken or sold under execution.*

Where the purchaser of land voluntarily paid to the sheriff the amount of an execution in his hands in a *bond fide* belief that it was a charge upon the land.

Held, that a party having a lien on said lands could not, under the Interpleader Act, claim the money so paid to the sheriff as against the execution creditor, even where he had relinquished his title to the land to enable the owner to carry out the said sale, and was to receive a portion of the purchase money.

Semble, that as the lands were neither "taken nor sold under execution." the case was not within the Interpleader Act.

Federal Bank of Canada v. Canadian Bank of Commerce.—xiii. 384.

20. *Subject to mortgage—Absolute sale—Sale of equity of redemption—Consideration in deed.*

B. sold to C. land mortgaged to a loan society. The consideration in the deed was \$1,400 and the sum of \$104 was paid to B. C. afterwards paid

Sale of Lands—Continued.

\$1,081 and obtained a discharge of the mortgage. B. brought an action to recover the balance of the difference between the amount paid the society and said sum of \$1,400, and on the trial he testified that he intended to sell the land for a fixed price; that he had been informed by W., father-in-law of C., that there would be about \$300 coming to him; that he had demurred to the acceptance of the sum offered, \$104, but was informed by C. and the lawyer's clerk, who drew the deed, that they had figured it out and that was all that would be due him after paying the mortgage; that he was incapable of figuring it himself and accepted it on this representation. C. claimed that the transaction was only a purchase by him of the equity of redemption, and that B. had accepted \$104 in full for the same.

Held, reversing the judgment of the Court of Appeal, Taschereau and Gwynne, JJ., dissenting, that the weight of evidence was in favour of the claim made by B., that the transaction was an absolute sale of the land for \$1,400; and independently of that, the deed itself would be sufficient evidence to support such claim in the absence of satisfactory proof of fraud or mistake.

Burgess v. Conway.—xiv. 90.

21. *Sale à réméré—Term—Notice—Mise en demeure—Res judicata.*

Held, affirming the judgment of the court below, where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished a completed house in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the house, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.

There was no *chose jugée* between the parties by the dismissal of a prior action on the ground that the time to exercise the right of redemption had not arrived, and the conditions stipulated had not been complied with.

Léger v. Fournier.—xiv. 314.

22. *Unknown quantity—Sold by the acre—Words "more or less"—Executors—Breach of trust.*

The executors of an estate were authorized by the will to sell such portion of the real estate as they in their discretion should think necessary to pay off a mortgage and such debts as the personal estate would not discharge. They offered for sale at auction a lot described as sixty acres (more or less) section 78, Loch End Farm, Victoria District, and giving the boundaries on three sides. The lot was unsurveyed and was offered for sale by the acre, an upset price of \$35 being fixed. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchaser.

S. purchased the lot for \$36 per acre and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity, alleging that only some \$2,000 was required to pay the debts of the estate, and refused to execute a deed of the 117 acres tendered by S. In a suit by S. for specific performance of the contract for sale of the whole lot,

Sale of Lands—Continued.

Held, reversing the judgment of the court below and restoring that of the judge on the hearing, Gwynne, J., dissenting, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity.

See v. McLean.—xiv. 631.

23. Vendor's lien—Sale of land—Notice.

W. S. agreed to transfer his timber limits to W. A. S. in case the latter should, within two years, pay off a mortgage to R. and other liabilities, and in case W. S. was obliged to pay any of such liabilities he was at liberty to sell such portion of said limits as would recoup him. At the same time W. S. wrote to R., authorizing him to transfer to W. A. S. said lands which he held as security on payment of his claim. R. assigned his claim and the limits to B. who, by agreement with W. A. S. and the executors of W. S. continued to carry on the lumber business formerly owned by W. S. Certain of the liabilities of W. S. not having been paid his estate claimed a vendor's lien on such limits, and relied on the letter to R., and on notice to an attorney who prepared the agreement with B. to establish notice of such lien in B.

Held, affirming the judgment of the court below, that even if such lien existed B. could not be said to be affected with notice of it.

Scott v. Benedict.—xiv. 735.

24. Purchase of land—Joint negotiations—Deed to one only—Evidence—Resulting trust.

McK. & S. jointly negotiated for the purchase of land, and a deed was given to S. alone, a portion of the purchase money being secured by the joint notes of McK. & S. In an action by S. to have it declared that McK. had no interest in the property ;

Held, reversing the judgment of the court below, and confirming the judgment of the trial judge, Henry, J., dissenting, that the evidence greatly preponderated in favour of the contention of McK. that the purchase was a joint one by himself and S.

Held, also, that S. being liable for an ascertained portion of the purchase money there was a resulting trust in his favour for his interest in the land.

McKercher v. Sanderson.—xv. 396.

25. By wife to secure debt of her husband—Simulated deeds—Art. 1301, C.C. (P.Q.).

See HUSBAND AND WIFE, 5.

26. Judgment in licitation—Binding on parties to it—Constitutionality of an act of incorporation of company—Vendor to company estopped from questioning validity of.

The Island of Anticosti, held in joint ownership by a number of people, was sold by licitation for \$101,000. The report of distribution allotted to G. B. (plaintiff) \$16,578.66, for his share, as owner of one-sixth of the island

Sale of Lands—Continued.

acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth. The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by her through her attorney, W. L. F., of the one-sixth to the Anticosti Company was a nullity, because the act incorporating the company was *ultra vires* of the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself, as representing the Anticosti Company, was not valid. The Anticosti Company was one of the defendants in the action for licitation, and the appellant an intervening part: no proceedings were taken by the appellant prior to judgment, attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff, now respondent.

Held, affirming the judgment of the court below, Ritchie, C.J., and Gwynne, J., dissenting, that as Dame C. Langan had herself recognized the existence of the company, and as the appellant, her legal representative, was a party to the suit ordering the licitation of the property, she the appellant, could not now on a report of distribution, raise the constitutional question as to the validity of the Act of Dominion Parliament constituting the company, and was now estopped from claiming the right of setting aside the deed of sale, for which her mother had received good and valuable consideration.

Forsyth v. Bury.—xv. 543.

[Leave to appeal was refused by the Judicial Committee of the Privy Council. See *Canadian Gazette*, Vol. xi., p. 418].

27. Contract—Rescission of—Setting aside conveyance of land—Misrepresentation—Matters of title—Fraud—Action for deceit—Evidence.

A party who seeks to set aside a conveyance of land executed in pursuance of a contract of sale, for misrepresentation relating to a matter of title, is bound to establish fraud to the same extent and degree as a plaintiff in an action for deceit.

B. bought land described as "two parcels containing 18 acres more or less," and afterwards brought an action for rescission of his contract, on the grounds that he believed he was buying the whole lot offered for sale, being some 25 acres, and that the vendor had falsely represented the land sold as extending to the river front. The evidence on the trial showed that B. had knowledge, before his purchase, that a portion of the lot had been sold.

Held, affirming the judgment of the court below, that even if B. was not fully aware that the portion so sold was that bordering on the river front, the knowledge he had was sufficient to put him on inquiry as to its situation, and he could not recover on the ground of misrepresentation.

Bell v. Macklin.—xv. 576

28. Sale by sheriff—Seizure *super non possidente*—Art. 6 & 32, C. C. P., (P.Q.)—Registration of real rights—Art. 2091, C.C. See SHERIFF, 10.

Sale of Lands—Continued.**29. Statute of frauds—Matters for future arrangement—Sale of land or of equity of redemption.**

L. signed a document by which he agreed to sell certain property to W. for \$42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the incumbrances thereon." With this exception the papers were, in substance, the same, and each contained at the end this clause: "terms and deeds, etc., to be arranged by the 1st of May next."

On the day that these papers were signed L., on request of W.'s solicitor, to have the terms of sale put in writing, added to the one signed by him the following: "Terms, \$500 cash this day, \$500 on delivery of the deed of the Parker property, \$800 with interest every three months until the six thousand five hundred dollars are paid, when the deed of the entire property will be executed."

The property mentioned in these documents was, with other property of L., mortgaged for \$86,000. W. paid two sums of \$500 and demanded a deed of the Parker property, which was refused.

In an action against L. for specific performance of the above agreement, the defendant set up a verbal agreement that before a deed was given the other property of L. was to be released from the mortgage, and also pleaded the Statute of Frauds.

Held, affirming the judgment of the court below, Patterson, J., doubting, that there was no completed agreement in writing to satisfy the Statute of Frauds.

Per Ritchie, C.J., the agreement only provides for payment of \$6,500 leaving the greater part of the purchase money unprovided for. If W. was to assume the mortgage it was necessary to provide for the release of L.'s other property and for matters in relation to the leasehold property.

Per Strong, J., the agreement was for sale of an equity of redemption only and as questions would arise in future as to release of L.'s other property from the mortgage and his indemnity from personal liability to the mortgagee, which, should have formed part of the preliminary agreement, specific performance could not be decreed.

Williston v. Lawson.—xix. 673.

30. Unpaid taxes—Irregular assessment—Validating Act—Nullity.

See ASSESSMENT AND TAXES, 24.

31. Sale in trust—Conditions to be performed by *cestui que trust*—Failure of—Revocation.

See TRUSTS AND TRUSTEES, 21.

32. Specific performance—Contract—Absolute deed of land—Undisclosed trust—Deed in name of third party—Collusion—Statute of Frauds.

See SPECIFIC PERFORMANCE, 5.

Sale of Lands—Continued.**33. Land, sale of—Delivery to agent—Pleading—Arts. 1501, 1502, C. C.**

S. T. brought an action to recover \$3,200 as balance of the purchase money of certain lands in Quebec sold by him to the N. S. & Co. To this action the railway company pleaded by temporary exception that out of 3,307 superficial feet sold to them, S. T. never delivered 710 feet, and that so long as the full quantity purchased was not delivered they were not bound to pay. To this plea S. T. replied specially that he delivered all the land sold to P. B. V., the agent of the company with their assent and approbation, together with other land sold to said P. B. V. at the same time. At the trial it was shown that P. B. V. had purchased all the lands owned by S. T. in that locality but exacted two deeds of sale, one of 3,307 feet for the Railway Company, and another of the balance of the property for himself. By the deed to P. B. V. his land is bounded by that previously sold to the company. P. B. V. took possession and the railway company fenced in what they required.

Held, affirming the judgments of the Court of Queen's Bench for (L. C.), that S. T. having delivered to P. B. V. the agent of the Company, with their assent and approbation, the whole of the land sold to them together with other lands sold to the said P. B. V. at the same time he was entitled to the balance of the purchase money.

Per Taschereau, J.—That all appellants could claim was a diminution of price, or cancellation of the sale under Arts. 1501, 1502, and that therefore their plea was bad.

Present: Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

North Shore Railway Company v. Trudel.—24 C.L.J. 57.—28th Oct. 1887.

Salvage—Action for, by agents of owners—Under agreement to manage tug on commission.

See MARITIME COURT OF ONTARIO, 7.

School—Grant of land for.

See CHARITABLE TRUST.

School Commissioners—Appeal from to Superintendent of education P.Q.—Mandamus to compel carrying out of decision of Superintendent—40 V. c. 22, s. 11 (P.Q.).

See EDUCATION, 3.

2. Superintendent of—Powers—Establishment of new school district—Appeal—Approval of three visitors—40 V. c. 22, s. 11 (P. Q.)—R. S. Q. Art. 2055.

See EDUCATION, 6.

Scienter.

See DAMAGES, 59.

Scire Facias—To set aside charter of incorporated company for non-fulfilment of condition precedent to legal organization of company—Form of proceedings—44 V. c. 6 (D.)—R. S. C. c. 21, s. 4—Arts. 997, *et seq.* C. C. P.

See CORPORATIONS, 48.

LETTERS PATENT, 2.

PATENT OF INVENTION, 1, 5.

Scrutiny.

See ELECTION, 12.

CANADA TEMPERANCE ACT, (1878), 7.

Seal—Want of, on insurance policy.

See INSURANCE, LIFE, 2.

2. On writ of execution—Sufficient without signature of prothonotary under practice in N. S.

See PRACTICE, 18.

Security—*Bon* given by purchaser at sheriff's sale of lands—Not security required by Art. 688, C. C. P.

See SHERIFF, 7.

2. For costs on appeal to Supreme Court of Canada.

See PRACTICE OF SUPREME COURT, 5, 6, 125-129, 143.

Servitude—*Barn erected over alley subject to right of access to drain—Aggravation—Art. 557, C. C.—Damages.*

In 1843, *B. et al.* (the plaintiffs) by deed obtained the right of draining their property by passing a good drain through an alley left open between two houses on another lot in the town of St. Johns. In 1880, *W. et al.* (defendants) built a barn covering the alley under which the drain was constructed and used it to store hay, etc., the flooring being loose and the barn resting on wooden posts. In 1881 the drain needing repairs, the plaintiffs brought an action *confessoria* against defendants as proprietors of the servient land, praying that they (plaintiffs) may be declared to have a right to the servitude constituted by the deed of 1843, and that the defendants be ordered to demolish such a portion of the barn as diminished the use of the drain, and rendered its exercise more inconvenient, and claiming damages; the defendants pleaded *inter alia* that there was no change of condition of the servient land contrary to law, and prayed for the dismissal of plaintiffs' action.

Held, Gwynne, J., dissenting, that by the building of the barn in question, the plaintiffs' means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment of the court below ordering the defendants to demolish a portion of their barn covering the said drain, in order to allow the plaintiffs to repair the drain as easily as they

Servitude—Continued.

might have done in 1848, when said drain was not covered, and to pay \$50 damages, should be affirmed.

Per Gwynne, J., That all plaintiffs were entitled to was a declaration of the right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion might require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature.

Wheeler v. Black.—xiv. 242.

2. Servitude—Aggravation of—Art. 558, C. C.

On the 26th March, 1858, one G. L. by deed of sale granted to P. C. "a right of passage through the lot of land of the said vendor fronting the public road as well on foot as with carriage," and to the charge to the said purchaser "of keeping the gates of the said passage shut."

In 1882 McM., having acquired the dominant land, built a coal oil refinery and warehouses thereon. In the course of his trade he had several heavy carts making three or four trips a day through this passage leaving the gates open, and in addition to his own carts most of the coal oil dealers of the city of Montreal, wholesale and retail, were supplied there with their own carts. At the time of the grant the land was used as agricultural land.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (M. L. R. 1 Q. B. 376), Henry, J., dissenting, that the passage could not be used for the purposes of a coal oil refinery and trade, as McM. thereby aggravated the servitude and rendered it more onerous to the servient land than it was when the servitude was established. Art. 558, C. C.

McMillan v. Hedge.—xiv. 736.

3. Construction of dam—Damage to land by—Improvement of water courses—Justification.

See RIPARIAN PROPRIETORS, 4.

4. The fact that a question of the right of servitude arises will not give jurisdiction on appeal to the Supreme Court—S. & E. C. Act, R. S. C. c. 135, s. 29 (b).

See JURISDICTION, 87.

Set Off—Right of—Goods sold by agent.

See SALE OF GOODS, 2.

2. By shareholder or contributory of bank.

See BANKS AND BANKING, 8.
WINDING-UP. 7.

Set off—Continued.**3. Not pleaded in action—Right to set off judgment—Equitable assignment.**

G. and H. brought counter actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which was granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to L. all interest in the suit against H. and gave notice of such assignment in May, 1884.

In February, 1885, H. signed judgment against G. on confession.

Held, reversing the judgment of the court below (25 N. B. Rep. 451), Strong, J., dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to L.

Present:—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

Greene v. Harris.—June 22, 1887.—xvi. 714.

Sewer—Construction of, from one municipality into territory of adjoining municipality—Restrictions—R. S. O. 1887, c. 184, s. 479, s-s. 15—51 V. c. 28, s. 20 (O.).

See MUNICIPAL CORPORATIONS, 18.

Shareholder—Liability of, in public company.

See CORPORATIONS, 1.

2. Liability of as a past member—The Imperial Companies' Act, 1862.

See CORPORATIONS, 15.

3. In bank of P. E. Island—Double liability.

See BANKS AND BANKING, 7.

4. Right of set-off by, in action against—45 V. c. 23, s. 76 (D.)—Winding up Act.

See BANKS AND BANKING, 8.

5. When a director—Sale by, to company invalid.

See CORPORATIONS, 26.

Shares—Held in trust—Transferred to bank—Notice—Obligation to account.

See TRUSTS AND TRUSTEES, 9, 14, 18, 20, 23.

Sheriff—Conversion by.

See CORPORATIONS, 5.

Sheriff—Continued.

2. Trover against—Justification under writ of execution, plea of.

See TROVER.

CHATTEL MORTGAGE.

3. *Sale by—Procès verbal of seizure, what it should contain—Arts. 638, C. C. P.*

Under a writ of *venditioni exponas*, issued in a suit wherein M. C. was plaintiff and D. G. was defendant, the latter's property was seized, advertised and sold to the appellants under the following description:—"4 lots of land or emplacements situate at Coteau St. Louis, in the parish of L'Enfant Jesus, heretofore forming part of the parish of Montreal, in the district of Montreal, being known and designated in the official plan and book of reference of the village of Coteau St. Louis, in the said parish of Montreal, under Nos. 18, 19, 20 and 21, of the sub-division of No. 167 of the said official plan and book of reference, with four wooden houses and dependencies thereon erected." The sale was made in one lot only, at the sheriff's office, in the city of Montreal. The respondents demanded the nullity of the sale by means of an opposition.

Held, that it was not sufficient to give only the number of the official plan and book of reference in the *procès verbal* of seizure and the advertisement of the sheriff, as under Art. 638, C. C. P., it is necessary to give the range or the street where the property is situated, in addition to the official number, and therefore the sale was null and of no effect.

[As to the sale having been made at the sheriff's office instead of at the church door of the Parish of l' Enfant Jesus, see 42 and 43 Vic. c. 25. (Q)].

Montreal Loan and Mortgage Co. v. Fauteaux.—iii. 411.

4. Replevin—Possession, writ of—Trespass.

See CONTRACT, 14.

5. *Action on bond given to sheriff in his official capacity—Nullité absolue—Opposition in nature of petition in revocation of judgment—Discovery of further evidence—Art. 581, C. C. P.—Dol personnel—Res judicata—Requête Civile.*

The appellant, William McD. Dawson, having purchased a property in the city of Three Rivers, which proved to be burdened with mortgages beyond its value, an action was brought on one of these mortgages by the hypothecary creditor, Dame Harriet Sawtell (Mrs. Dickson), upon which the appellant, Dawson, made *délaissement*. Judgment was accordingly obtained and the property sold at sheriff's sale on the 21st February, 1862, when the said William McD. Dawson became the purchaser.

Claims against the estate (*oppositions à fin de conserver*) were filed largely exceeding the amount of purchase money. Among these claims, (oppositions) was one by the said purchaser, Dawson, for a large sum of money, upon the filing of which the then sheriff, I. G. Ogden, took from him the said purchaser,

Sheriff—Continued.

a small payment in cash and a bond or obligation for the balance, secured upon the property itself.

By the final judgment of distribution, the largest claim, that of the Honourable Judge Gale, was awarded a fraction of the amount due thereon, being the residuary amount of the purchase money after the collocations made in favour of prior claims; while for the claim of the purchaser, which was held to be the last, there was nothing left. It appeared that the collocation in favour of the late Judge Gale was not paid.

The then sheriff, the late I. G. Ogden, having died, his heirs or legatees all in one form or another, renounced their legal rights to his estate, with the exception of the original plaintiff in this cause, Isaac Low Evans Ogden, one of his sons, who assigned the said obligation, as an asset of his father's estate, to William McDougall, then a practicing attorney at the bar, who brought an action upon it against the present appellant, which action was defended on the plea that the said obligation was not a private or personal asset of the said I. G. Ogden, but a security to ensure the payment of the hypothecary creditors collocated by the final judgment of distribution, in the case of *Sawtell v. Dawson*. It was also pleaded that the then plaintiff, being a practicing attorney at the bar of the same court where the action was brought, could not become the purchaser of a litigious right by the Arts. 1485 and 1583 of the civil code.

The said Wm. McDougall then reassigned the said obligation to I. L. E. Ogden, and an action was commenced on his behalf.

The defendant's (present appellant's) pleas in defence were, practically, that there was *litis pendens*, because of the action already pending on the same obligation; that the record (which had been destroyed by the burning of the court house in Quebec) should be restored or at least an effort made to that effect, before any other proceeding could be taken; and the repetition of the former pleading: that the obligation was the sheriff's security for the balance of the purchase price of the property, and did not represent a personal debt due to the late Mr. Ogden, and was sued upon as such, in fraud of the defendant and the true creditors of the debt it represented. The plaintiff denied that the previous action involved the same issue, or that the present action was for the security stated, or that the obligation represented the purchase money of the property.

On the 24th April, 1875, the respondent, sued out a writ of execution against the appellant in pursuance of this last mentioned judgment.

On the 3rd of May, 1875, the appellant filed an opposition in the nature of a petition in revocation of judgment, which is the subject of the present appeal.

Amongst other reasons it contained the following:—

1. That since the rendering of the last mentioned judgment on the action itself, the representatives of the late Judge Gale had claimed from the said opposant, William McD. Dawson (the appellant), the amount of their collocation, threatening to proceed at *folle enchère* to the re-sale of opposant's (appellant's) property, and that the said opposant thus found himself liable to pay twice the same amount.

Sheriff—Continued.

2. That since the rendering of the judgment the opposant (the appellant) had discovered proof that the security mentioned in the return of the sheriff was one and the same with the notarial obligation on which the judgment was founded.

3. That since the judgment, the opposant (appellant) had made discovery of an authentic part of the record, and that the production of the said document, being of a nature to affect the judgment sought to be executed could take place under the article 581 of the Code of Civil Procedure of the Province of Quebec.

4. That the judgment should be rescinded and revoked, having been rendered through the collusion and fraud of the respondent and others.

The missing document was the sheriff's schedule of the nature of sale, and an authentic copy of it certified by the prothonotary was found and produced. The opposant (the appellant) also produced with his opposition the sheriff's receipt for the obligation itself, which he alleged proved the obligation to be as contended by the defendant (the appellant) the security taken by the sheriff in his official capacity for the payment of the balance of the purchase money, which belonged to the hypothecary creditors.

On the 14th of May, 1875, a *tierce opposition* was filed by the representatives of the Gale estate, claiming the obligation above mentioned as a mere security for the amount of their collocation by the report of distribution and denying the right of the heirs Ogden to any part of the said obligation.

On the 8th of September, 1875, Isaac Low Evans Ogden having died, the present respondent, Charles Kinnis Ogden, brought himself into the case as plaintiff *par reprisse d'instance*.

On the 11th May, 1877, the respondent produced his plea to the opposition of the defendant (appellant).

On the 20th of September, 1877, the opposition of appellant was dismissed by the Superior Court at Three Rivers, McCord, J., on the ground that there was *res judicata* against him.

The Court of Queen's Bench on the 8th of March, 1878, by their judgment, ordered, "that the proceedings on the opposition of the said appellant shall be suspended until after the opposition of the representatives of the said Hon. Samuel Gale, filed in this cause, shall have been disposed of."

On the 12th December, 1878, the respondent contested the *tierce opposition* of the heirs Gale in obedience to this last judgment of the Court of Queen's Bench.

On the 18th April, 1879, the *tierce opposition* of the representatives Gale was maintained by the Superior Court at Three Rivers, with regard to the part of its conclusions which referred to the seizure of the real estate.

On the 7th September, 1880, this last judgment on the *tierce opposition* was modified by the Court of Queen's Bench. This judgment also admitted the rights of the heirs Gale, and ordered them to proceed in the space of four months to the re-sale at *folle enchere* of the property purchased in the case of *Sawtell v. Dawson*.

Sheriff—Continued.

The present appellant, Dawson, contended, that he was not a party to this appeal, and he was thus condemned without hearing and without notice to submit to the re-sale of a property which he had paid by an obligation, while the judgment of the 10th of June, 1874, condemning him to pay to the heirs of the sheriff personally the amount of said obligation, remained in full force.

The record having been sent back to Three Rivers, the four months expired without, as the appellant alleged, any notice whatever having been given to him of the judgment, or of any other proceeding since the judgment on his appeal given in his favour on the 8th of March, 1878.

On the 18th of January, 1881, an inscription on the merits of the opposition of May, 1875, was served upon him. This inscription was discharged by the court.

On the 17th of March, 1881, a new inscription was made, and also discharged.

On the 25th of June, 1881, the respondent made a motion before the Superior Court of Three Rivers, asking that the rights conferred on the heirs Gale by the judgment of the Court of Queen's Bench to have the property of the appellant re-sold at *folle enchère* in the space of four months, be declared elapsed. The appellant was not notified of the said motion, which was granted on the 25th of June, 1881.

A motion was then served upon the defendant, Dawson (the appellant), on the 19th of September, 1881, by the plaintiff, *par reprise d'instance*, to be allowed to make a new contestation of his opposition of May, 1875, which was refused by the court.

On the 23rd of November, 1881, the Superior Court at Three Rivers, dismissed the opposition and petition in revocation of judgment of appellant. This judgment was confirmed by the Court of Queen's Bench, on the 4th of December, 1882.

On appeal to the Supreme Court of Canada, Held, that the judgment of the Court of Queen's Bench should be reversed and the appeal allowed.

Per Taschereau, J., delivering the judgment of the court.—Dawson's obligation to Ogden was not a *créance* of Ogden personally, but of him as sheriff only, and represented the price of Dawson's purchase at the sheriff's sale. The sheriff's heirs therefore were not entitled to the amount of the obligation in the absence of the allegation and proof, that they or their father in his lifetime paid the amount to the various parties collocated.

Moreover the obligation was null as being against public order, and a nullity of this kind was absolute and need not be pleaded, the tribunal being bound to notice it.

The judgment on the action did not decide anything contrary to these views, because the courts below had not before them the proof that the obligation in question represented nothing but the adjudication price, the necessary documents to establish that fact having been since found by Dawson. The judgment appealed from was not based on *res judicata*; it conceded, as it was obliged to do in the face of the judgment of that court reversing the judgment

Sheriff—Continued.

of the court dismissing the *requête civile*, that the right to a *requête civile* was open. But it held that the opposant had not proved the facts he alleged. This court, however, is of opinion the appellant has clearly proved his allegations of fact: 1. That the words "value received" in the obligation were false; that the obligation was not given to the late sheriff personally, but to him in his official capacity only, and so has proved the *dol personnel*, the fraud by which the late Ogden obtained that obligation, and the fraud of the plaintiff's *auteur* is his fraud; 2. That the obligation was *nul d'une nullité absolue*; 3. The only *res judicata* is in favor of Dawson; 4. That not only the Gales, but all the other parties could ask a re-sale.

Appeal allowed with costs.

Dawson v. Ogden.—19th June, 1883.

6. Sale of mortgaged premises by, under decree of foreclosure, in Nova Scotia.

See MORTGAGE, 12.

7. Sale by—Purchase at—Adjudication to joint purchasers—Security not given as required by Art. 688, C. C. P., L. C.—One joint adjudicataire in default cannot demand a sale à la folle enchère—Arts. 691, 694, 760, C. C. P., L. C.

At a certain judicial sale, on the 10th of July, 1875, the appellant, James Shortis, the respondent Leduc, and one Michel Caron became joint purchasers of a certain immovable for the price of \$2,500.

On the 28th August, 1875, the sheriff made his return on the writ of execution stating that he had levied a net sum of \$2,352.90, which had been paid to him by a bond as required by law, and that he held that sum subject to the order of the court. This pretended bond was in reality a "bon" in the following terms: "Good to S. Dumoulin, Esquire, sheriff, for two thousand two hundred and ninety-nine dollars and sixty-five cents, for value received, payable to his order. This bon serves as security in the matter No. 225 L. J. O. Brunelle *et al.* against Charles Coté. Three Rivers, 2nd August, 1875," and signed by the three purchasers, James Shortis, Michel Caron, and the respondent Leduc.

On the return of the sheriff various distributions were made and the respondent collocated for the sums of \$1,876.76 and \$259.93.

The appellant, R. H. McGreevy, being a creditor of James Shortis, the other appellant, in virtue of a judgment rendered in his favour, intervened in the case to exercise the rights of his debtor.

On the 5th of March, 1883, the respondent served the judgments of distribution on appellant James Shortis, and on the representatives of Michel Caron, deceased; and on the 20th of the same month he made his petition for an order to resell the very property purchased by himself jointly with the other "adjudicataires" for false bidding.

Appellant McGreevy was allowed to appear on the said petition and filed an appearance.

Sheriff—Continued.

These proceedings being of a summary nature no written answers were put in, and on the 16th of June following, the Superior Court, sitting at Three Rivers (Bourgeois, J.), granted the said petition of respondent ordering the resale of the property for false bidding upon the purchasers, James Shortis and Michel Caron alone; and this judgment was confirmed by the Court of Queen's Bench, sitting at Quebec, on the 7th day of May, 1884, modifying, however, the judgment of the Superior Court by ordering the re-sale to be made upon the three "adjudicataires." Monk and Ramsay, JJ., dissenting.

The question to be decided was, whether the respondent had the right to demand the re-sale of a property of which he was a co-purchaser together with Michel Caron and the appellant James Shortis, for false bidding, he himself being one of the "adjudicataires" in default, who had retained the purchase money by giving their joint "bon," instead of furnishing the sheriff with the sureties required by law.

On appeal to the Supreme Court of Canada, Held, *per* Strong, Henry and Taschereau, JJ., Ritchie, C.J., and Fournier, J., dissenting, reversing the judgment of the courts below, that the respondent was not entitled to demand a re-sale. The bon given by the purchasers was not the surety contemplated by Art. 688 of the Code; and the three purchasers having made with the sheriff an agreement not contemplated by law, should be compelled to govern themselves according to that agreement, and the respondent's only course was by direct action against his co-debtors to recover from them their share.

Per Taschereau, J.—The obligation contracted by Shortis, Caron and Leduc in becoming joint purchasers at a judicial sale was a joint and several obligation, and it follows that their "bon" bound them jointly and severally also. Under such an obligation they were responsible only towards each other for one-third of the purchase money, and each for the whole to the sheriff. By the judgments of the courts below, the appellant Shortis found himself individually compelled to pay the full amount of the price of sale to respondent, to prevent the re-sale of the property; (Arts. 694 and 760, C. C. P.); while, if there was any default, the respondent was equally in default with his co-adjudicataires, and there could be no doubt a private agreement had been come to between the three purchasers which the respondent sought to repudiate.

Per Ritchie, C.J., dissenting.—McGreevy could be in no better position than his debtor, and to allow him to get a third of this property as the property of Shortis without payment by himself or Shortis of the third of the price which he was bound to pay, seems so unreasonable and unjust that it would be necessary to be satisfied beyond all doubt that the law was clear and unquestionable on the point before sanctioning what appears such manifest injustice.

Per Fournier, J., dissenting.—The question whether there being three joint purchasers (adjudicataires) who have all made default in paying the price of their adjudication, one of them can, as hypothecary creditor mentioned in the certificate of registration and as a collocated creditor unpaid, proceed to a sale *à la folle enchère* of the immoveable sold to the three purchasers, is very clearly settled by Art. 691, of the C. C. P.

Sheriff—Continued.

The only right the appellant had was that of exercising the rights of Shortis, his debtor, and if the appellant wished to avail himself of those rights, he should fulfil the obligation of his debtor by paying his share of the adjudication. He was seeking to have a third of the immoveable adjudged to Shortis without paying the third of the price of adjudication which Shortis was bound to pay.

Appeal allowed with costs.

McGreery v. Leduc.—May 12th, 1885.

8. Promise of indemnity by attorney to—Authority to bind client.

See APPEAL, 18.

9. *Action against—Execution of writ of attachment—Abandonment of seizure—Estoppel.*

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ, that he had seized the goods. The sheriff subsequently seized the goods under execution of the creditors. In an action against the sheriff.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it was, the sheriff was estopped by his return to the writ from raising the question.

Held, also, that the act of the plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

Duffus v. Creighton.—June 22, 1887.—xiv. 740.

10. *Sheriff's sale—Petition en nullité de décret—Seizure super non possidente—Art. 632, C. C. P.—Registration of real rights—Art. 2091, C. C.*

D. (respondent) proprietor of a lot in Montreal sold it to C. *et al.* In 1879 C., who had acquired the interest of his co-owners retroceded the lot in question to D. In July, 1884, the sheriff of the district at the instance of J.M.D. *et al.* (appellants) judgment creditors of C., seized, sold and adjudicated the lot in question to G. *et al.*, who paid the adjudication and obtained a sheriff's title to the lot in question. D. did not register her deed of retrocession until 3rd October, 1884, being a date subsequent to the seizure and sale by the sheriff, but prior to the registration of the deed from the sheriff. Thereupon D. by a petition *en nullité en décret* prayed that the seizure, sale, adjudication and sheriff's title to be set aside and declared null as having been made *super non domino*. At the trial it was proven that from the date of the deed of retrocession D. had been assessed for the lot in question and paid taxes thereon, and that it was in possession of one McA. as her tenant at the time of the seizure.

Sheriff—Continued.

Held, affirming the judgment of the court below, that the seizure and sale in the present instance having been made *super non domino et non possidente*, the sheriff's title was null. Art. 632, C. C. P.

Per Taschereau, J.—The provisions of Arts. 2090 and 2091, C. C. refer to a valid seizure and sale and cannot be invoked against the registration of the deed of retrocession.

Dufresne v. Dixon.—xvi. 596.

11. Action for recovery of land—Conveyance by husband to wife set aside as fraudulent—Statement in pleadings as to possession in wife—Sale by sheriff as against husband—Irregularities in.

See EJECTMENT, 5.

12. Title to goods—Married woman—Execution against husband—*Replevin*—Justification by sheriff—Married Woman's Property Act, R. S. N. S. 5th ser. c. 74.

In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act (R. S. N. S. 5th ser. c. 74) the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names and that A's. right to the goods seized was acquired from her husband after marriage which would not make it her separate property under the Act.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the action could not be maintained, that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without showing the judgment, (*McLean v. Hannon*, 3 Can. S. C. R. 706, followed), and that under the findings of the jury which were amply supported by the evidence, the goods seized must be considered to belong to the husband which is a complete answer to the action.

Crowe v. Adams.—xxi. 342.

13. Will—Construction of—Usufruct—Sale by sheriff of part of testator's estate in possession of person under title from usufructuary—Validity of—Art. 711, C. C. P.

See WILL, 26.

Ships and Shipping—Breach of agreement not to charter—Contract of agency apart from ownership—Ship's husband.

See CONTRACT, 2.

2. Collision with anchor of vessel—Damages.

See MARITIME COURT OF ONTARIO, 2.

Ships and Shipping—Continued.**3. Assessment of ships—37 V. c. 30, s. 1, and 27 V. c. 81, R. S. (N. S.)—Vessels not registered in Halifax not liable.**

K. resides and does business in the city of Halifax, and is owner of ships which are not registered at the city of Halifax, and which have never visited the port of Halifax. Under the authority of 37 V. c. 30, s. 1, and 27 V. c. 81, ss. 340, 347, 861, R. S. (N.S.), the assessors of the city of Halifax valued the property of K. and included therein the value of said vessels.

Held, that vessels owned by a resident, but never registered at Halifax, and always sailing abroad, did not come within the meaning of the words "whether such ships or vessels be at home or abroad at the time of assessment," and therefore were not liable to be assessed for city taxes.

The City of Halifax v. Kenny.—iii. 497.

4. Charter party—Damage to ship—Unavoidable delay—Refusal of charterers to load—Action by ship owners.

By a charter party of December 11th, 1878, it was agreed that plaintiff's vessel, then on her way to Shelburne, N. S., should proceed with all possible despatch, after her arrival at Shelburne, to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before 1st of January, 1879, the charterers were to be at liberty to cancel the charter party. The vessel arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the harbour of St. John she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs. She was not ready to receive her cargo until 21st of April following, prior to which time—on 26th March—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the shipowners and charterers, they should find for the defendants. The verdict being for the defendants, the court below made absolute a rule for a new trial.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that as there was no condition precedent in the charter that the ship should be at St. John at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract.

Carrill v. Schofield.—ix. 370.

Ships and Shipping—Continued.

5. *Towage—Contract of—Liability under—Damage—Joinder of defendants—Right of a saw mill company to let to hire a steam tug—Liability limited—25 & 26 V. (Imp.) c. 63—31 V. c. 58, s. 12—Motion for judgment—Findings of jury not against weight of evidence—Practice.*

The B. C. T. Co. entered into a contract of towage with S., to tow the ship "Thrasher" from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangements between the B. C. T. Co. and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat "Etta White," and the B. C. T. Co.'s tug "Beaver" proceeded to tow the "Thrasher" out of Nanaimo on her way to sea, the "Etta White" being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering, upwards of ten miles open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were strangers to the coast. In an action for damages for negligently towing the ship, and so causing her destruction.

Held, 1. That as the tugs had not observed those proper and reasonable precautions in adopting and keeping the course to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so the owners of the tugs were jointly and severally liable, Taschereau, J., dissenting as to the liability of the M. S. Co., and holding that the B. C. T. Co. were alone liable.

2. That under the British Columbia Judicature Act the action was maintainable in its present form by joining both companies as defendants.

3. That as there was nothing in the M. S. Co.'s charter or Act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used for in the present case.

4. That as the tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 25 & 26 V. (Imp.) c. 63.

5. That the limited liability under s. 12 of 31 V. c. 58 (D.) does not apply to cases other than those of collision.

6. This case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875, the court could give judgment, finally determining all questions in dispute, although the jury may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of a jury. In case the court consider particular findings to be

Ships and Shipping—Continued.

against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40.

The Supreme Court of Canada, giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for \$80,000 and costs.

[In this case the Judicial Committee of the Privy Council granted leave to appeal, but the case was settled before coming on for hearing.]

Sewell v. B. C. Towing Co.—ix. 527.

6. Agreement to insure ship to amount of advances, construction of.

See AGREEMENT, 10.

7. Merchants' Shipping Act, 1854—Does not prevent property in ship passing to assignee in insolvency under Insolvent Act, 1875.

See INSOLVENCY, 13.

8. *Charter party—Deficient cargo—Demurrage—Dead freight—Damages.*

By charter party the appellants agreed to load the respondent's ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days demurrage were agreed on over and above lying days at forty pounds per day. Penalty for non-performance of the agreement, was estimated amount of freight. Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit. The ship was ready to receive cargo on the 15th November, 1880, at 11 a.m., and the appellants began loading at 2 p.m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the forward hold. No other cargo was ready, and as the appellants would not put the rye anywhere except in the forward hold, the loading stopped. At 8 a.m. on the 19th the loading recommenced and continued night and day until 6 a.m. Sunday, the 21st, at which time the vessel sailed, in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. If the ice in the canal had not detained the barges having grain to be loaded, the vessel could have been loaded on the night of the 19th. The respondent sued appellants because ship had not received full cargo, and claimed 2½ days, 15th, 16th and 17th of November, and freight on 214½ tons of cargo not shipped. The appellants contended delay was not due to them but to the ship in not supplying baggers and sewers to bag the grain. That the time lost on the first week was made up by night work, and that mere delay

Ships and Shipping—Continued.

in loading could not sustain claim for dead freight. The Superior Court gave judgment for the respondent for the dead freight but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the court below, Henry, J., dissenting, that as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages and that the proper measure of the respondent's claim was the amount of agreed freight which they would have earned upon the deficient cargo. That the demurrage days mentioned in the charter were over and above the laying days and had no reference to the loading of the ship.

Lord v. Davidson.—xiii. 166.

9. *Charter party—Damage to vessel—Repairs—Nearest port—Deviation—Breach of charter.*

In September, 1892, a vessel sailed from Liverpool, G.B., for Bathurst, N.B., to load lumber under charter. Having sustained damages on the voyage she was taken to St. John, N.B., for repairs, and when such repairs were completed it was too late in the season to proceed to Bathurst. In an action against the owner for breach of charter party the jury found that the repairs could have been made at Sidney, C.B., in time to enable the ship to go to Bathurst.

Held, that the jury having pronounced on the questions of fact, and their verdict having been affirmed by the Supreme Court of New Brunswick, this court would not interfere with the finding.

Held, also, that under such finding taking the vessel to St. John was such an unnecessary deviation from the voyage as to entitle the charterer to recover.

Cassels v. Burns.—xiv. 256.

10. *Bill of lading—Excepted perils—Construction of—Negligence.*

See BILL OF LADING, 5.

11. *Charter party—Delivery of freight—Payment—Concurrent acts—Tender—Trover for cargo—Lien.*

A cargo of coal was consigned to B. and the master of the vessel refused to deliver it unless the freight was prepaid, which B. in his turn refused but offered to pay it ton by ton as delivered. By direction of the owner's agent the coal was taken out of the vessel and stored, whereupon B. tendered the amount of the freight and demanded it, but the agent still refused to deliver unless the cost of storage was paid. In trover against the master:

Held, affirming the judgment of the court below, Gwynne, J., dissenting, that the refusal of the agent after tender of the full freight was a conversion of the cargo for which trover would lie.

Held, per Patterson, J., that trover would lie, but not against the master, who was only the servant of the agent, and acting under his directions.

Ships and Shipping—Continued.

Held, also, that an action *ex delicto* for breach of duty in not delivering the coal according to the bill of lading would not lie.

Winchester v. Busby.—xvi. 336.

12. Maritime Court of Ontario—Collision—Damages—Party in fault—Answering signals.

See MARITIME COURT OF ONTARIO, 6.

13. Salvage—Claim for—Power of attorney—Authority to settle and adjust—Right to receive payment.

See POWER OF ATTORNEY, 3.

14. *Difference between actual freight and that specified in charter party—Bill for, by master on agents of ship, and also for disbursements—Notice of dishonour to managing owner—Guarantee of, in consideration of delay of proceedings—Misrepresentation, not available as defence under plea of fraud—Age and infirmity of witness—Death of, after trial—New trial, inutility of.*

On a ship under charter being loaded it was found that a sum of £178 was due the charterer for the difference between the actual freight and that specified in the charter party and, as agreed, a bill for the amount was drawn by the master on the agents of the ship, and, also, a bill of £735 for disbursements. These bills not being paid at maturity notice of dishonour was given to V., the managing owner, who sent his son to the solicitors who held the bills for collection to request that the matter should stand over until the ship arrived at St. John, where V. lived. This was acceded to and V. signed an agreement in the form of a letter addressed to the solicitors, in which, after asking them to delay proceedings on the draft for £735 he guaranteed, on the vessels arrival or in case of her loss, payment of the said draft and charges and also payment of the draft for £178 and charges. On the vessel's arrival, however, he refused to pay the smaller draft and to an action on his said guarantee, he pleaded payment and that he was induced to sign the same by fraud and misrepresentation. By order of a judge the pleas of payment were struck out.

On the trial the son of V. who had interviewed the solicitors swore that they told him that both bills were for disbursements, but it did not clearly appear that he repeated this to his father. V. himself contradicted his son and stated that he knew that the smaller bill was for difference in freight, and there was other evidence to the same effect. His counsel sought to get rid of the effect of V.'s evidence by showing that from age and infirmity he was incapable of remembering the circumstance, but a verdict was given against him. It was admitted that if there had been any misrepresentation by the solicitors, it was innocent misrepresentation only.

Held, affirming the decision of the Supreme Court of New Brunswick, that the defence of misrepresentation set up was not available to V. under the

Ships and Shipping—Continued.

plea of fraud, and, therefore, was not pleaded; that if available without plea, it was not proved; that nothing could be gained by ordering another trial as V. having died, his evidence would have to be read to the jury who, in view of his statement that he knew the bill was not for disbursements, could not do otherwise than find a verdict against him.

Held, further, that the delay asked for by V. was sufficient consideration to make him liable on his guarantee, even assuming that he would not have been originally liable as owner of the ship.

Yaughan v. Richardson.—xxi. 359.

Short-hand Writer—Notes of—Not extended in his own handwriting, but signed by him, admissible in evidence.

See ELECTION, 19.

2. Evidence taken by, though not an official stenographer of the Court, but sworn and appointed by judge, need not be read over to the witness when extended.

See ELECTION, 46.

Slander—Privileged communication—Public officer.

The appellant D., having been appointed chief post office inspector for Canada, was engaged, under directions from the Postmaster General, in making enquiries into certain irregularities which had been discovered at the St. John post office. After making enquiries, he had a conversation with the respondent, W., alone in a room in the post office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the Assistant Postmaster was called in, and the appellant said: "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The respondent, having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the assistant postmaster.

Held, on appeal, 1. That the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the assistant postmaster were privileged.

2. That the onus lay upon respondent to prove that the appellant acted under the influence of malicious feelings, and as the jury found that the appellant had not been actuated by ill-feeling, the respondent was not entitled to retain his verdict, and a rule for a non-suit should be made absolute.

Dewe v. Waterbury.—vi. 143.

2. Damages, in action of—Duty of Appellate Court.

See JURISDICTION, 5.

LIBEL.

Solicitor—Practising without certificate—Allowing name to appear as a member of firm—Estoppel.

M., a solicitor, who had not taken out the certificate entitling him to practice in the Ontario courts, allowed his name to appear in newspaper advertisements and on professional cards and letter heads as a member of a firm in active practice; he was not, in fact, a member of the firm, receiving none of its profits and paying none of its expenses, and the firm name did not appear as solicitors of record in any of the proceedings in their professional business. The law society took proceedings against M. to recover the penalties imposed on solicitors practising without certificate, in which it was shown that the name of the firm was endorsed on certain papers filed of record in suits carried on by the firm.

Held, reversing the judgment of the court below, that M. did not "practice as a solicitor" within the meaning of the Act imposing the penalties, R. S. O. (1877) c. 140, and that he was not estopped, by permitting his name to appear as a member of a firm of practising solicitors from showing that he was not such a member in fact.

McDougall v. The Law Society of Upper Canada.—xviii. 203.

Solicitor and Client.—Purchase of land by solicitor.

See SALE OF LANDS, 5.

2. **Negligence—Omission to include property in mortgage—Omission to register—Laches by client—Evidence.**

C., a member of the defendant's firm of solicitors was employed to prepare a mortgage for W., who gave instructions, partly verbal and partly written. Nearly six years after W. brought an action against the firm for neglecting to register the mortgage, and shortly before the trial asked to be allowed to add to his statement of claim an allegation of neglect to include a certain property in the mortgage, which he claimed had been included in the instructions. There was conflicting evidence at the trial as to the instructions, and judgment was given for the defendants, which judgment was sustained by the Divisional Court and by the Court of Appeal.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgments of the courts below, that as the plaintiff had delayed so long in prosecuting his claim against the defendants, and the judge who heard the case had decided against him on the evidence, this court would not interfere with that judgment affirmed by two courts.

Appeal dismissed with costs.

White v. Currie, 22 C. L. J. 17.—November 16, 1885.

3. **Promise of indemnity by attorney to sheriff—Authority to bind client.**

See APPEAL, 18.

4. **Opposition en sous ordre—Moneys deposited in hands of prothonotary—C. C. P., Art. 753.**

Held, *per* Ritchie, C.J., Strong and Taschereau, JJ., affirming the judgment of the Court of Queen's Bench, Montreal, that where moneys have been

Solicitor and Client—Continued.

voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition *en sous ordre*.

Fournier and Gwynne, JJ., dissenting, on the ground that as the moneys were still subject to the control of the court at the time the opposition *en sous ordre* was filed, such opposition was not too late.

Barnard v. Molson.—xv. 716.

5. Negligence—Failure to register judgment—Retainer.

A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment and thereby precluding the client from recovering the amount of his judgment debt.

Per Strong, J., A retainer to prosecute an action does not terminate when the judgment is obtained but makes it the duty of the attorney or solicitor without further instructions to proceed after judgment and endeavor to obtain the fruits of the recovery including the making it by registration a charge on the lands of the judgment debtor.

Hett v. Pun Pong.—xviii. 390.

6. Action by solicitor—Election petition—Retainer—Evidence of.

See EVIDENCE, 49.

7. Solicitor—Bill of costs—Reference to taxing master—Procedure—Appeal.

The executors of an estate having taken proceedings to obtain an account from the solicitor the latter produced his account for costs and disbursements, which were referred to a taxing officer to be taxed and to have an account taken of all moneys received by the solicitor for the estate. In proceeding under this order the officer took evidence of an alleged agreement for settlement of the solicitor's bill and reported a balance due from the solicitor who was ordered to pay the costs of the application.

Held, affirming the judgment of the Court of Appeal, that the officer not only had authority, but was obliged, to proceed and report as he did and his report should be affirmed.

It is doubtful if a matter of this kind, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court.

O'Donohoe v. Beatty.—xix. 356.

Special Case—Further evidence.

See EVIDENCE, 1.

Specific Performance—Of agreement for sale of land.

See SALE OF LANDS, 3, 10, 16.

Specific Performance—Continued.**2. Of agreement for sale of patent.**

See PATENT OF INVENTION, 2.

3. Of agreement in lease for renewal of second term.

See LANDLORD AND TENANT, 10.

4. Sale of lands—Equity of redemption—Matters for future arrangement—Contract—Statute of frauds.

See SALE OF LANDS, 29.

5. Deed of land—Undisclosed trust—Enforcement—Statute of Frauds.

The property of M. having been advertised for sale under power in a mortgage his wife arranged with the mortgagee to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the amount B. agreed to lend it for a year taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the agreed price which B. signed, and he told the solicitor that he would advise him by telephone whether the deed would be taken in his own name or his daughter's. The next day a telephone message came from B.'s house to the solicitor instructing him to make the deed in the name of B.'s daughter, which was done, and the deed was executed by M. and his wife and the arrangement with the mortgagee carried out. Subsequently B.'s daughter claimed that she had purchased the property absolutely, and for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee of the property subject to repayment of the loan from B. and for specific performance of the agreement. The plaintiff in the action charged collusion and conspiracy on the part of the defendants to deprive her of the property, and in addition to denying such charge, defendants pleaded the Statute of Frauds.

Held, affirming the decision of the Court of Appeal for Ontario (19 Ont. App. R. 602), Strong J. dissenting, that the evidence proved that his daughter was aware of the agreement made with B. and the deed having been executed in pursuance of such agreement she must be held to have taken the property in trust as B. would have been if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff.

Barton v. McMillan.—xx. 404.

6. Of agreement to provide for granddaughter by will—Services rendered—Remuneration—Quantum meruit.

S., a girl of fourteen, lived with her grandfather who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five when she married. The grandfather died shortly

Specific Performance—*Continued.*

after leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for the daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses.

Held, reversing the decision of the Court of Appeal for Ontario, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance. But

Held, further, that S. was entitled to remuneration for her services and \$1,000 was not too much to allow her.

Appeal dismissed with costs and decree varied.

McGugan v. Smith.—xxi. 263.

7. *Contract for exchange of lands—Time for completion—Extension—Rescission—Conduct of party seeking relief.*

The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shown to the conduct of the person seeking relief.

H. and R. agreed to exchange land, and the agreement, which was in the form of a letter written by H. proposing the exchange, the terms of which R. accepted, provided that the matter was to be closed in ten days if possible. R. at the time had no title to the property he was to transfer, but was negotiating for it. Nearly four months after the date of the agreement the matter was still unsettled, and a letter was written by H. to R.'s solicitor notifying him that unless something was done by the next morning the agreement would be null and void.

Prior to this there had been several interviews between the parties and their solicitors, in which it was pointed out to R. that there were difficulties in the way of his getting a title to the land he proposed to transfer; that there was no registry of the contract which formed the title of the man who was to convey to him, and that the lands were subject to an annuity; R., however, took no active steps to get the difficulties removed until after the above letter was written, when he brought an action against the proposed vendor and obtained a decree declaring his title good. He then brought suit against H. for specific performance of the contract for exchange.

Held, reversing the judgment of the Court of Appeal for Ontario. Taschereau, J., dissenting, that the action could not be maintained; that R. not having title when the agreement was made, H. could rescind the contract without giving reasonable notice of his intention, as he would be bound to do if the title were merely imperfect; that the letter to the solicitor was sufficient to put an end to the bargain; and that even if there had been no rescission the conduct of R. in relation to the completion of the contract was such as to disentitle to relief by way of specific performance.

Specific Performance—Continued.

Held, also, affirming in this respect the judgment of the courts below, that time was originally of the essence of the contract, but there was a waiver by H. of a compliance with the provision as to time by entering into negotiations as to the title after its expiration.

Harris v. Robinson.—xxi. 390.

Stamps—On bill of exchange—Plea of want of.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2, 6.

Statute—Declaration by—Customs duties—Articles imported in parts—Subsequent imposition of duty.

The several parts of an article called an "Automatic Sprinkler" were manufactured in the United States and imported into Canada where they were put together. The Crown sought to collect duty on such parts according to the value of the complete article. There was no duty imposed on parts of an article at the time the information was laid.

Held, that the subsequent passage of an Act, 48 & 49 V. c. 61, s. 12, re-enacted by 49 V. c. 32, s. 11, imposing a duty on such parts was a legislative declaration that it did not previously exist. But *see* now 53 V. c. 7, (D.)

Grinnell v. The Queen.—xvi. 119.

2. Railway Co.—Special Act—Restrictive provisions—By-law—Bonus—Defects of form.

The Act incorporating a railway company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act.

Held, that such special Act was not restrictive of the Municipal Act and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus.

Held, also, that all defects of form in the by-law were cured by 44 V. c. 24, s. 28, providing for registry of by-laws and requiring an application to quash to be made within three months after such registry.

Bickford v. Town of Chatham.—xvi. 235.

And *see* **RAILWAYS AND RAILWAY COMPANIES**, 42.

3. Construction of—New Brunswick Liquor License Act, 1887—Constitutionality of—Prohibition of sale of liquor—Granting a license—Powers of Mayor of a city—Disqualifying liquor sellers—Effect of.

The New Brunswick Liquor License Act, 1887, provides that "all applications for license, other than in cities and incorporated towns, shall be presented at the annual meeting of the council of the municipality and shall then be taken into consideration, and in cities and incorporated towns at a meeting to be held not later than the first day of April, in each and every year." The interpretation clause provides that in the City of St. John the expression "council" means the mayor, who has the powers given to a municipal council. It is also provided that when anything is required to be done at, on or before

Statute—Continued.

a meeting of council, and no other date is fixed therefor, the mayor may fix the date for doing the same in the city of St. John.

Held, affirming the judgment of the court below, that the provision requiring licenses to be taken into consideration not later than the first day of April is directory only, and licenses granted in St. John are not invalid by reason of the same being granted after that date.

Held, *per* Gwynne, J., that this provision does not apply to the city of St. John.

Applications for licenses under the Act must be endorsed by the certificate of one-third of the ratepayers of the district for which the license is asked. No holder of a license can be a member of the municipal council, a justice of the peace, or a teacher in the public schools.

Held, that the legislature could properly impose these conditions to the obtaining of a license, and the provision is not *ultra vires* the local legislature as being a prohibitory measure by reason of the ratepayers being able to prevent any licenses being issued; nor is it a measure in restraint of trade by affixing a stigma to the business of selling liquor.

Danaher v. Peters; O'Regan v. Peters.—xvii. 44.

4. Construction of—Assignment for benefit of creditors—Costs of execution creditors—Lien—Ontario Judicature Act, 1881, s. 43—Validity of—Appeal.

See ASSIGNMENT, 18.

LEGISLATURE, 17.

5. Halifax City Assessment Act, 1883—46 V. c. 28, (N.S.)—Sale of land under—Effect of—Healing clauses—Lien—Priority over mortgage made before Act passed.

See ASSESSMENT AND TAXES, 19.

LIEN, 7.

6. 35 V. c. 3, amended by 35 V. c. 52 (Man.)—Setting aside letters patent—Error and improvidence.

In an action to set aside letters patent for error and improvidence under the Manitoba Act, 85 V. c. 8, amended by c. 52.

Held, *per* Patterson, J.—That in the construction of the statute effect must be given to the term improvidence as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the court to form a definite opinion as to the relative strength of opposing claims.

Fonseca v. Attorney-General of Canada.—xvii. 612.

See LETTERS PATENT, 2.

Statute—Continued.**7. Prerogative of Crown—Interference with—R. S. C. c. 120, s. 79.**

The Crown prerogatives can only be taken away by express statutory enactment. Therefore, Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors is not interfered with by the provisions of the Bank Act (R. S. C. c. 120, s. 79), giving note-holders a first lien on such assets, the crown not being named in such enactment. Gwynne and Patterson, JJ., *contra*.

The Maritime Bank v. The Queen.—xvii. 657.

See CROWN, 21.

8. Construction of—R. S. O. (1887) c. 124, s. 2—Assignment for benefit of creditors—Preference—Pressure.

See ASSIGNMENT, 15.

9. Repeal—R. S. N. S. 4 Ser. c. 29—42 V. c. 1, s. 67 (N.S.)—Boards of health.

S. 67 of the Act by which municipal corporations were established in Nova Scotia (42 V. c. 1) giving them the appointment of health officers . . . and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R. S. N. S. 4th ser. providing for the appointment of boards of health by the Lieutenant-Governor in Council. Ritchie, C.J., doubting the authority of the Lieutenant-Governor to appoint in incorporated counties.

Municipality of the County of Cape Breton v. McKay.—xviii. 639.

And see MUNICIPAL CORPORATION, 14.

10. Statute—Repeal of—Restoration of former law—Distribution of intestate estate—Feme covert—Husband's right to residuum—Next of kin.

The Legislature of New Brunswick, by 26 Geo. III. c. 11, ss. 14 & 17, re-enacted the Imperial Act, 22 & 23 Car. 2, c. 10 (Statute of Distributions) as explained by s. 25, Car. 2, c. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estate as theretofore.

When the statutes of New Brunswick were revised in 1854 the Act, 26 Geo. III. c. 11, was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme covert* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission.

Held, that the personal property passed to the husband and not to the next of kin of the wife.

Per Strong, J.—The repeal by the R. S. of 26 Geo. III. c. 11, which was passed in affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law of New Brunswick.

Statute—Continued.

Per Gwynne, J.—When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. III. c. 11 (N. B.), it was not necessary to enact the interpretation section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act.

Held, per Ritchie, C.J., Fournier, Gwynne and Patterson, JJ., that the Married Woman's Property Act of New Brunswick (C. S. N. B. c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed.

Lamb v. Cleveland.—xix. 78.

11. Construction of—49 V. c. 45, s. 2 (Man.)—Transfer of personal property—Preference—Pressure—Intent.

See ASSIGNMENT, 21.

12. Lands of the C. P. Ry. Co.—Charter of company—Exemption “until sold or occupied”—Exemption before patent issues.

See ASSESSMENT AND TAXES, 23.

13. Construction of—Manitoba Libel Act, 50 V. c. 22—Manitoba Newspaper Act, 50 V. c. 23—Authority to publish newspapers—Deposit of affidavit or affirmation.

See LIBEL, 6.

NEWSPAPER.

14. Construction of—Municipal taxation—Sale for taxes—Validating Act.

See ASSESSMENT AND TAXES, 24.

15. *Application of—Negligence of servant—Crown—Liability of*—44 V. c. 25—R. S. C. c. 38—50-51 V. c. 16, s. 18—*Retroactive operation.*

Held, reversing the judgment of the Exchequer Court, that even assuming 50-51 V. c. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expresses no opinion), such act is not retroactive in its effect and gives no right of action for injuries received prior to the passing of the Act.

The Queen v. Martin.—xx. 240.

16. 43 V. c. 8—Construction of Government railways—Injury by overflow of water.

See CROWN, 30.

Statute—Continued.

17. Maintenance of county buildings—Establishment of county court house and jail—Right to remove from shire town—
R. S. (N.S.) 5th Ser. c. 20, s. 1, as amended by 49 V. c. 11.

See MUNICIPAL CORPORATIONS, 22.

18. R. S. O. (1887) c. 159 (General Road Companies Act)—53 V. c. 42—Application to company incorporated by special charter.

See CORPORATIONS, 49.

19. As to effect of recital in private Act, and distinction between public and private Acts.

Corporation of the City of Quebec v. Quebec Central Ry. Co.—x. 568.

- Statute of Frauds**—Bill for redemption—Absolute deed—Parol evidence to show that it was to take effect as a mortgage, held admissible—Evidence of plaintiff uncorroborated insufficient—36 V. c. 10 (Ont.).

See MORTGAGE, 8.

2. Deed of land—Dispute as to joint interest—Trust account.

See SALE OF LANDS, 7.

3. Vendor and purchaser—Specific performance—Contract not signed by vendor, and subsequently admitted by his letters.

See SALE OF LANDS, 10.

4. Boundaries—Agreement as to, whether executed or executory—Plan signed by adjoining proprietors—Purchaser for value without notice—Discretionary jurisdiction of Court of Equity.

See BOUNDARY, 2.

5. Contract, parol evidence to establish, when admissible—As to whether a mem. in writing contained the terms of agreement, a question for jury—Damages—Common counts.

See SALE OF GOODS, 10.

6. *Contract relating to interest in land—Part performance.*

B., a resident of British Columbia, wrote to his sister, in England, that he would like one of her children to come out to him, and in a second letter he said, "I want to get some relation here, for what property I have, in case of sudden death, would be eat up by outsiders, and my relations would get noth-

Statute of Frauds—Continued.

ing." On hearing the contents of these letters T., a son of B.'s sister and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter, T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours. Answer immediately. (Sgd.) B." Under these circumstances, T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death.

Held, affirming the judgment of the court below, that as there was no agreement in writing for the transfer of the property to T., and the facts shown were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with, and no performance of the contract could be decreed.

Turner v. Prevost.—xvii. 283.

7. Contract—Matters for future arrangement—Terms, deeds, etc., to be arranged by 1st of May next—Sale of land.

See SALE OF LANDS, 29.

8. Contract—Deed of land—Undisclosed trust—Deed in name of third party—Specific performance.

M. agreed by written contract to give to B. an absolute deed of property as security for a loan, the same to be held by B. in trust for the time the loan was to run. By B.'s directions the deed was made out in his daughter's name. The daughter having claimed that she purchased the property absolutely, and for her own benefit, an action was brought by M. against her and B. for specific performance of contract with B. and for a declaration that the daughter was a trustee only subject to the repayment of the loan. The defendants denied the allegation of collusion and conspiracy charged in the statement of claim and pleaded the Statute of Frauds.

Held, Strong, J., dissenting, that the evidence showed that the daughter was aware of the agreement made with B., and the Statute of Frauds did not prevent parol evidence being given of such agreement.

Barton v. McMillan.—xx. 404.

Statute of Limitations.

See LIMITATIONS.

POSSESSION.

Stenographer.

See SHORTHAND WRITER.

Stock—In building society—Transfer—By-law—Indebtedness to society—Security.

See BY-LAW, 18.

INSOLVENCY, 27.

2. Transfer of "in trust"—Duty of transferee to make inquiry.

See TRUSTS AND TRUSTEES, 14, 18, 20, 23.

Stoppage in transitu—*Goods in bond*.

The appellants, merchants in New York, sold to E. B. & Co., at Toronto, 250 barrels of currants on credit, and consigned the same in bond. A bill of lading thereof was duly received by E. B. & Co., who paid the freight thereon and gave their acceptance for the price of the said goods, as well as for the cartage and American bonding charges. The goods, on arrival, were entered and bonded in the consignee's name, and placed in one of the customs bonded warehouses subject to the payment of the duties. E. B. & Co. sold and delivered 150 barrels, and the remaining 100 barrels were bonded under 31 V. c. 6, (D.), in a portion of E. B. & Co.'s warehouse, partitioned off and used by the customs authorities. Before the acceptances matured, and while a portion of the goods remained in bond, E. B. & Co. became insolvent.

Held, affirming judgment of the Court of Error and Appeal, Ontario, that the *transitus* was at an end, and that the appellants had lost the right to stop the goods remaining in bond.

Howell v. Alport, 12 U. C. C. P. 375, and *Graham v. Smith*, 27 U. C. C. P. 1, overruled.

Wiley v. Smith.—ii. 1.

2. Bill of lading, assignment of—Property in goods under replevin.

See BILL OF LADING, 8.

Streams—*R. S. O. c. 115, s. 1, construction of*—*Non-floatable streams*—*Private property*.

By the decree of the Court of Chancery for Ontario, the respondents were restrained from driving logs through, or otherwise interfering with a certain stream, where it passed through the lands of the appellant, and which portion of said stream was artificially improved by him so as to float saw logs, but was found by the learned judge at the trial not to have been navigable or floatable for saw logs or other timber, rafts and crafts, when in a state of nature. The Court of Appeal reversed this decree, on the ground that C. S. U. C. c. 48, s. 15, re-enacted by R. S. O. c. 115, s. 1, made all streams, whether naturally or artificially floatable, public waterways.

Held, reversing the judgment of the Court of Appeal and restoring the decree of the Court of Chancery, that the learned Vice-Chancellor who tried the case, having determined that upon the evidence adduced before him, the stream at the *locus in quo*, when in a state of nature, was not floatable without the aid of artificial improvements, and such finding being supported by the evidence in the case, the appellant had, at common law, the exclusive right to use his property as he pleased, and to prevent respondents from using as a

Streams—Continued.

highway the stream in question where it flowed through appellant's private property.

Held, also (approving of *Boale v. Dickson*, 18 U. C. C. P. 337), that the C. S. U. C. c. 48, s. 15, re-enacted by the R. S. O. c. 115, s. 1, which enacts that it shall be lawful for all persons to float saw logs and other timber, rafts and crafts down all streams in Upper Canada, during the spring, summer and autumn freshets, etc., extends only to such streams as would, in their natural state, without improvements, during freshets, permit saw logs, timber, etc., to be floated down them, and that the portions of the stream in question, where it passes through the appellant's land, were not within the said statute.

[The Privy Council has reversed the decision of the Supreme Court and restored the judgment of the Court of Appeal, 9 App. Cases 392].

McLaren v. Caldwell.—viii. 435.

Streets—Of city of Halifax, duty of corporation to keep in repair.

See CORPORATIONS, 18.

2. Of city of Quebec—Authority to North Shore Railway Company to use—Non-liability of corporation.

See CORPORATIONS, 21.

3. Of town of Portland, N.B.—Liability for defect in sidewalk.

See CORPORATIONS, 23.

4. Municipal corporation—Construction of crossing above level of street—Negligence.

See MUNICIPAL CORPORATION, 10.

5. Municipal corporation—Statutory powers—Control over streets—Alteration of grade—Negligence—34 V. c. 11 (N.B.)—45 V. c. 61 (N.B.).

See MUNICIPAL CORPORATION, 15.

6. Municipal corporation, duty of, to light streets—Liability for negligence—Position of hydrant—Obstruction of sidewalk.

See MUNICIPAL CORPORATION, 20.

7. Municipal corporation—Improvement or alteration of street—Lowering grade—Injury to adjacent land—Compensation under—Statutory provisions—51 V. c. 42, s. 190, (B.C.).

See MUNICIPAL CORPORATION, 21.

8. Municipal corporation—Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Insufficiency of not pleaded—34 V. c. 11, (N.B.) 25 V. c. 16, (N.B.).

See MUNICIPAL CORPORATION, 25.

**Subrogation—Conventional—What will effect Art. 1155, s. 2—
Erroneous noting of deed by registrar.**

No formal or express declaration of subrogation is required under Art. 1155, s. 2, C. C., when the debtor borrowing the sum of money declares in his deed of loan that it is for the purpose of paying his debts, and in the acquittance he declares that the payment has been made with the moneys furnished by the new creditor for that purpose.

Where subrogation is given by the terms of a deed the erroneous noting of the deed by the registrar as a discharge, and the granting by him of erroneous certificates, cannot prejudice the party subrogated.

Owens v. Bedell.—xix. 187.

**Substitution—Right of substitutes when substitution open, to
attack deed given for insufficient consideration.**

See DEED, 3.

2. Action by substitute against institute for detaching property.

See WILL, 10.

**3. Substitution, curator to—Rights of action—Intervention by a
plaintiff in another capacity when irregular—Art. 154,
C. C. P.**

Held, affirming the judgment of the court below, that a curator to a substitution has no right of action to recover from a curator in whose stead he has been appointed any monies due by the latter and belonging to institutes.

Also, that an assignee of the institutes has no right to intervene in an action brought by said assignee in his capacity of curator to the substitution, and in which no final judgment could have been obtained which could impair the legal rights of the institutes.

Semble.—An intervention filed when the action has been heard on the merits and the case is *en délibéré* is irregular.

Dorion v. Dorion.—8th March, 1886.—xiii. 198.

**4. Minors—Tutor *ad hoc*—Intervention—Status—Arts. 269, 945,
C. C.**

See TUTOR AND MINOR, 2.

5. Bank shares—Dividends—Intervention—*Res judicata*.

See JUDGMENT, 11.

**6. Substituted property—Pledge of shares by one of the *grévés*
—The shares held in trust—Payment by curator with full
knowledge of facts—*Condictio indebiti*—Registration—
Arts. 931, 938, 939, 1047, 1048, C. C.**

See TRUSTS AND TRUSTEES, 20.

Substitution—Continued.**7. Curator to—Action to account—Divisibility of.***See* ACCOUNT, 5.

WILL, 21.

Succession—Acceptance of an insolvent succession—When obtained by fraud—Notary, duty of—Arts. 646, 650, C. C. (P.Q.)—Appeal.

A, who had a claim against the insolvent estate of Dr. B., purchased a right of redemption Dr. B. had at the time of his death in a certain piece of land; and in order that B. *et al.* (the respondents, Dr. B.'s children), who were perfectly solvent, should accept the succession of Dr. B., A. caused to be prepared a deed of assignment by a notary of this right of redemption to B. *et al.*, who, a few days after the death of their father, had been induced for a sum of \$50 to consent to exercise this right of redemption. The notary who prepared the deed without the knowledge of B. *et al.*, returned it to A., telling him that he did not like to receive the deed because he believed that in signing it B. *et al.* made themselves heirs of Dr. B., and besides he believed that if B. *et al.* knew that in signing the deed they accepted the succession of their father, and were responsible for his debts, they would not sign. Another notary residing at a distance was sent for by A., to whom he gave the deed as prepared, and the notary then went to the residence of B. *et al.*, read the deed to the parties, and without any explanation whatever passed and executed the deed of cession, whereby B. *et al.* became responsible for the debts of their father. On being informed of the legal effect of their signature, B. *et al.* formally renounced to the succession of their father. There was also evidence that B. *et al.* had done some conservatory acts and acts of administration for their mother, but it was not proved that in any of these transactions they had taken the quality of heirs. The amount in dispute was made up by including interest, which on the face of the declaration was prescribed. The respondents did not demur to this part of the demand, nor was any separate judgment rendered as to it.

Held, 1. That the case was appealable.

2. That the acceptance of an insolvent succession is null and of no effect when it is the result of deceit and corrupt practices, artifices and fraud.

3. That as A. in this case obtained the signatures of B. *et al.* to the deed in question by fraud, the latter should not be burthened with the debts of their insolvent father.

4. That it is the duty of a notary when executing a deed to explain to an illiterate grantor the legal and equitable obligations imposed by the deed, and consequent on its execution. Henry, J., dissenting.

Ayotte v. Boucher.—ix. 460.

2. Moneys deposited in bank to credit of—Relation of creditor and debtor.*See* BANKS AND BANKING, 4.

Supreme and Exchequer Courts Acts—38 V. c. 11—Construction of s. 17.

The court of last resort in Prince Edward Island is the Supreme Court of Judicature in that province.

Kelly v. Sullivan.—i. 1.

2. Construction of—"Sum or value in dispute" in appeals from Province of Quebec.

See JURISDICTION.

3. *Construction of s. 22, 38 V. c. 11.*

Held, under s. 22 of the Supreme and Exchequer Court Act, no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion.

Boak v. The Merchants' Marine Ins. Co.—i. 111.

[But *see* S. C. A. Act 1880, s. 4, and the R. S. C. c. 185, s. 24, par. (d) as amended by 54-55 V. c. 25, s. 2 (1891)].

4. *Construction of s. 26, 38 V. c. 11.*

Held, that the court proposed to be appealed from, or any judge thereof, cannot, under s. 26 of the Supreme and Exchequer Court Act, allow an appeal when judgment had been signed, entered or pronounced previous to the eleventh day of January, 1876.

Taylor v. The Queen.—i. 65.

5. *Construction of s. 38, 38 V. c. 11.*

By 38 V. c. 11, s. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the judges.

[But *see* "Practice of the Supreme Court," 39].

The L. & L. & Globe Insurance Co. v. Wyld.—i. 605.

6. *Construction of ss. 38 & 49, 38 V. c. 11.*

Held, that since the passing of 32 & 33 V. c. 29, s. 80, repealing so much of chapter 77 of Cons. Stat. (L.C.) as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32 & 33 V. c. 36, repealing s. 63 of c. 77 Cons. Stat. (L.C.), the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada, exercising the ordinary appellate powers of the court, under ss. 38 & 49 of 38 V. c. 11, should give the judgment which the

Supreme and Exchequer Courts Acts—Continued.

court whose judgment is appealed from ought to have given, viz. : To reverse the judgment which has been given, and order prisoner's discharge.

Laliberte v. The Queen.—i. 117.

See ELECTION, 10, 13.

HABEAS CORPUS.

INSOLVENCY, 3.

JURISDICTION.

NEW TRIAL, 4.

LICENSE, 6.

PRACTICE OF SUPREME COURT.

Suretyship—Contract of with firm—Death of partner—Liability of surety after.

See PARTNERSHIP, 6.

2. Misconduct of cashier—Sanction of directors—Dealings in stock—Liability of sureties of cashier.

See BANKS AND BANKING, 14.

3. Bank taking forged paper in renewal of notes—Release of surety.

See BANKS AND BANKING, 15.

4. Execution of bond by Government official for faithful discharge of his duties—Evidence of execution—Proximate cause of acceptance by Crown—Estoppel.

See EVIDENCE, 35.

5. Surety—Endorsement of note—Agreement for commission—Failure to discount—Right to enforce agreement.

See CONTRACT, 46.

6. Embezzlement of bank funds—Bond given by surety to stifle prosecution—Illegal consideration.

See CONTRACT, 57.

Surveyors—Disputes as to boundary—Reference to surveyors—Duties of, under reference.

See BOUNDARY, 5.

Synod—By-law of—Alteration of application of Commutation Fund.

See COMMUTATION FUND.

T.

Tariff.

See CUSTOMS DUTIES.

Tax—On transient merchants, traders, etc.

See LICENSE.

2. Upon filings in court—43 & 44 V. c. 9, s. 9 (Q.).

See LEGISLATURE, 7.

3. Non-liability of Crown for.

See ASSESSMENT AND TAXES, 12, 24.

PETITION OF RIGHT, 21.

Telegraph Company—Liability of for message.

See LIBEL.

2. Erection of line—Right to cut trees.

See TRESPASS, 7.

Telephone—Service—Transmission of message—Use of wire.

See CONTRACT, 54.

Tenants in Common—*Non-joinder of tenants in common as plaintiffs in action for use and occupation—Mesne profits.*

C. O. H. and J. E. H. were tenants in common of certain property under the will of their father T. H. and each occupied a portion of such property. On the 30th December, 1868, the plaintiff purchased the interest of C. O. H. at sheriff's sale. C. O. H. died on the 7th March, 1870, and his widow, the defendant, with the assent of J. E. H. remained in possession of the portion of the property which had been in the possession of C. O. H. As the result of proceedings for partition carried on against the heirs of T. H., and to which the defendant was no party, the portion so occupied by the defendant was, on the 12th August, 1873, allotted to the plaintiff as sole owner. He thereupon brought an action for use and occupation, adding a count in trespass for the mesne profits since the death of C. O. H.

The Supreme Court of Nova Scotia made absolute a rule *nisi* to enter a non-suit, being of opinion that no action would lie for use and occupation, the widow occupying adversely; that no action would lie for mesne profits as there had been no previous recovery in ejectment by plaintiff, and that even if a contract had been proved to sustain use and occupation, the non-joinder of J. E. H. as a plaintiff, was fatal to the action as brought. (*See* 2 Russ. & Ches. 229).

Tenants in Common—Continued.

The Supreme Court of Canada, **Held**, 1. An action of trespass for meane profits is consequential to the recovery in ejectment.

2. Even if such an action would lie under some circumstances without ejectment brought, the plaintiff could not recover without satisfactory evidence of actual entry and possession.

3. After entry there is a relation back to the actual title as against a wrong-doer, and an action may be maintained for trespass prior to such entry. But in this case, besides a deficiency of evidence of entry, there was some evidence that the defendant remained in possession subsequent to the 12th August, 1878, the day the plaintiff's title accrued, with the assent of the plaintiff. Strong, J., *dubitante*.

4. In any event the action for meane profits would not lie, the defendant having been previous to the 12th August, 1878, in possession with the consent of J. E. H., the co-tenant in common, and being, therefore, entitled to a notice to quit, or demand of possession, before her possession could be considered tortious.

Lecain v. Hosterman.—January 28, 1878.

2. Tenancy in common—Construction of will—Evidence to establish—Intention—Severance.

See WILL, 20.

Tenant for Life—Insurable interest of.

See INSURANCE, FIRE, 14.

2. Possession of tenant of—Statute of Limitations as respects remainder-man.

See POSSESSION, 9.

Tenancy at Will—Statute of Limitations—Possession as caretaker—Finding of the judge at the trial.

The plaintiff's father, who lived in the township of T., owed a block of 400 acres of land, consisting respectively of lots 1 in the 18th and 14th concessions of the township of W. The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else, or allow any one else to take it. He settled in 1849 upon the south half of lot 1 in the 18th concession. Having got a deed for the same in November, 1864, he sold these 100 acres to one M. K. In December following he moved to the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north 50 acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The learned judge at the trial found that the plaintiff entered into possession and so con-

Tenancy at Will—Continued.

tinned merely as his father's caretaker and agent, and he entered a verdict for the defendant. There was evidence that within the last seven years, before the trial, the defendant as agent for the father was sent up to remove plaintiff off the land, because he had allowed timber to be taken off the land, and that plaintiff undertook to cut no more and to pay the taxes and to give up possession whenever required to do so by his father.

Held, reversing the judgment of the Court of Appeal for Ontario, that the evidence established the creation of a new tenancy at will within ten years.

Per Gwynne, J.—That there was also abundant evidence from which the judge at the trial might fairly conclude, as he did, that the relationship of servant, agent, or caretaker, in virtue of which the respondent first acquired the possession, continued throughout.

[Followed in *Heward v. O'Donohoe*, 19 C. S. C. R. 341, *see* Possession, 10.]

Ryan v. Ryan.—v. 887.

Tender—Plea of—Effect of.

See SALE OF GOODS, 12.

Timber—Sale of—Agreement for.

See AGREEMENT, 1, 4.

2. License to cut.

See NEW TRIAL, 3.

3. Crown regulations as to payment of dues on.

See PETITION OF RIGHT, 18.

4. Advances to get out—Lien for.

See LIEN, 2.

5. Proceeds of sale of timber—Right to apply to re-pay advances—Account.

The declaration of the appellant, (plaintiff) in the court of original jurisdiction, set out, that at Quebec, on the 14th of June, 1877, he was the owner and in possession of a raft of white pine timber, containing about 156,000 feet, and valued at \$30,000. That, being in want of money, he then applied to the defendant Ross for a loan of \$3,000, which he obtained on transferring to the defendant, as security, the raft in question. That the defendant had since disposed of the timber, but never accounted to him for the proceeds. The plaintiff, admitting that the defendant was entitled to re-pay himself out of the funds in his hands, an advance of \$3,000, and all expenses necessarily incurred by him in connection with the custody and sale of the raft, prayed that he be condemned to render an account, or, in default, to pay \$30,000, the alleged value.

The defendant, while acknowledging the receipt of the timber, pleaded, amongst other things, that it was received, not from the plaintiff Doran, but from one William Bannerman, whose property it was, under whose instruc-

Timber—Continued.

tions he had disposed of it, and to whom he had, long before suit brought, duly accounted for its disposal.

As the case turned exclusively on the view to be taken of the evidence respecting the nature of the transactions between Ross, Bannerman and Doran, and the facts are somewhat complicated, it is considered unnecessary to set them out at length.

The Superior Court (Meredith, C.J.), held that the plaintiff was not entitled to the account for which he asked, the dealings of defendant having been with Bannerman, to whom alone the defendant was accountable, and Doran having no real interest when his action was brought.

This judgment was affirmed by the Court of Queen's Bench for Lower Canada, and on appeal to the Supreme Court of Canada, it was Held, that it should be affirmed by the latter court. Fournier and Henry, JJ., dissenting.

Appeal dismissed with costs.

Doran v. Ross.—23rd June, 1884.

Timber License—Injunction—41 V. c. 14 (P.Q.)—Sale by commissioner of Crown lands of lands subject to current timber licenses, effect of—Licensee's rights.

Under the provisions of the Quebec Act, 41 V. c. 14, the D. of C. L. & C. Co., in November, 1881, alleging themselves to be proprietors and in possession of a number of lots in the township of Whitton, P.Q., obtained an *ex parte* injunction, restraining G. B. H. *et al.* from further prosecuting lumbering operations which they had begun on these lots. G. B. H. *et al.* were cutting in virtue of a license from the government, dated 3rd May, 1881, which was a renewal of a former license. By a report of the executive council of the Province of Quebec, dated 1st April, 1881, and approved of by the Lieutenant-Governor in Council on the 7th of the same month, the commissioner of Crown lands was authorized to sell to the company the lands in question, and the company deposited \$12,000 to the credit of the department, to be applied on account of the intended purchase. On the 9th of May the company gave out a contract for the clearing of a portion of the land, and on 19th July, 1881, the commissioner executed a deed of sale in favour of the company, subject, amongst other conditions, "to the current licenses to cut timber on the lots." Upon the writ being returned, the injunction was suspended. G. B. H. *et al.* answered the petition, and the Superior Court dissolved the injunction. On appeal to the Court of Queen's Bench, this judgment was reversed and the injunction applied for made perpetual.

On appeal to the Supreme Court of Canada, Held, (Henry and Gwynne, JJ., dissenting), that D. of C. L. & C. Co., had not acquired any valid title to the lands in question prior to the 19th July, 1881, and that by the instrument of that date their rights were subordinated to all current licenses, and G. B. H. *et al.* having established their right to possess said lands for the purpose of carrying on their lumber operations under a license from the Crown, dated 3rd May, 1881, the injunction granted *ex parte* to the D. of C. L. & C. Co., in

Timber License—Continued.

November, 1881, under the provisions 41 V. c. 14 (P.Q.) had been properly dissolved by the Superior Court.

Hall v. Dom. of Canada Land and Colonization Company.—viii. 631.

2. **Permits to cut timber (Man.)—Rights of holders of—Dominion Lands Act, 1879, s. 52.**

On the 21st November, 1881, Sinnott, *et al.* obtained a permit from the Crown Timber Agent, Manitoba: "To cut, take and have for their own use from that part of Range 10 E, that extends five miles north and five miles south of the Canadian Railway track, the following quantities of timber, 2,000 cords of wood and 25,000 ties, permit to expire on 1st May, 1882." A similar permit was granted to Sinnott, *et al.* on the 10th February, 1882, to cut 25,000 ties. In February, 1882, under leave granted by an order in council of 27th October, 1881, Scoble, *et al.* cut timber for the purposes of the construction of the Canadian Pacific Railway, from the lands covered by the permit of 21st November, 1881. Sinnott, *et al.* by their bill of complaint, claimed to be entitled by their "permit" to the sole right of cutting timber on said lands until the 1st of May, 1882, and prayed that the defendants Scoble, *et al.* might be restrained by injunction from cutting timber on said lands, and might be ordered to account for the value of the timber cut. Scoble, *et al.* justified their acts under the order in council of the 27th October, 1881, and denied the exclusive possession or title to the lands or standing timber.

The plaintiffs applied *ex parte* for, and obtained, an interim injunction against the defendants. At the hearing Miller, J., made the injunction perpetual, and ordered a reference to ascertain the damages caused plaintiffs by the cutting of the timber by defendants. On re-hearing, this decree was reversed and a decree was made in effect dismissing the plaintiff's bill with costs and directing an account to be taken of the damage sustained by reason of the interim injunction.

Held, that the decree made on re-hearing by the Court of Queen's Bench of Manitoba should be affirmed, that the permit in question did not come within the provisions of the Dominion Lands Act of 1879, and did not vest in the plaintiffs any estate, right or title in the tract of land upon which they were permitted to cut, nor did it deprive the government from giving like licenses, or others of equal authority, to other persons, as long as there was sufficient timber to satisfy the requirements of the plaintiffs' licenses.

Sinnott v. Scoble.—xi. 571.

3. **License granted by Old Province of Canada—Dispute with New Brunswick—Petition of right against Dominion by licensee.**

See PETITION OF RIGHT, 20.

4. **Crown Lands, P. Q.—Location ticket—Transfer of purchaser's rights—Registration of—Waiver by Crown of non-performance of settlement duties—Action against license for cutting timber.**

See CROWN LANDS, 1.

Timber License—Continued.

5. Crown Lands—License to cut timber—Free grants—Patent—Interference with rights of patentee—R. S. O. 1887, c. 25, s. 3.
See CROWN LANDS, 2.

6. Sale of timber limits—R. S. Q. Art. 5976—Plan—Description—Damages—Art. 992, C. C.—Petition of right—Style of cause.

See CROWN, 28.

Timber Limits—Sale of.

See SALE OF LANDS, 1.

2. Bonus on transfer of, payable by purchaser when agreement silent.

See SALE OF LANDS, 9.

Time—Essence of contract—Exchange of lands—Waiver by—Entering into negotiations as to title after time expired.

See SPECIFIC PERFORMANCE, 7.

PRACTICE OF SUPREME COURT, 141, 147, 149.

Title—Completion of—Specific performance.

See SALE OF LANDS, 4.

2. Under decree—Confirmed by statute, R. S. N. S. 4th series c. 36, s. 47.

See SALE OF LANDS, 17.

3. Plaintiff not put to proof of—Possession fraudulently obtained.

See POSSESSION, 5.

4. Construction of dam—Damage to land by—Prescription—Possession—Art. 2193, C. C.

See RIPARIAN PROPRIETORS, 4.

5. To land—Possession as caretaker—Evidence—Statute of Limitations.

See POSSESSION, 10.

6. To land—Action against husband and wife to recover possession—Allegation of possession in wife—Sale by Sheriff against husband—Irregularities in—Right of wife to set up.

See EJECTMENT, 5.

Title—Continued.

7. Declaration of—Devise of land without estate therein—Possession—Statute of Limitations.

" This is an appeal from a judgment of Mr. Justice Rose which was afterwards affirmed by the Divisional Court of the Common Pleas Division of the High Court of Justice of Ontario.

" The action was brought for the purpose of obtaining a declaration that the plaintiff was entitled to an estate in fee simple in remainder in the lands in question, being the north half of lot 55, west side of Spadina avenue, Toronto, subject to an estate in the defendant Hayes for the life of the defendant Mrs. Roberts. The defendants denied the plaintiff had any title whatever to the land, and relied on actual possession and also upon a title acquired by virtue of the Statute of Limitations.

" The judgment appealed from was in favor of the plaintiff.

" The material facts of the case are as follows: 'On the 4th June, 1844, one William Reeve in consideration of £50 conveyed the whole of lot 55, west side of Spadina avenue, Toronto, to James Hughes and Simon Hardcastle in fee simple, as tenants in common, and the conveyance was duly registered.'

" On the 14th August, 1846, James Hughes made his will, whereby he devised to his wife Anne for life or widowhood all his real estate 'consisting of the north half of the said lot 55.' The will then proceeded: 'The above named property left to my wife at the end of her natural life or when she become married again. I then will and bequeath to my brother Simon (Hardcastle) during his natural life, and then at the expiration of that time it is to go to my heir. I also will and bequeath to my heir one stepping shilling. I hereby appoint my brother Simon sole executor.'

" James Hughes and Simon Hardcastle were step-brothers without any blood relationship between them.

" James Hughes died in 1847 leaving his wife Anne surviving him, and there is no evidence who was his heir at law. It was agreed by counsel on the argument that no one has ever come forward to claim the property as heir.

" On the death of James Hughes his widow Ann Hughes went into possession of the north half of lot 55 and continued in possession until her death in June, 1856.

" On the 12th May, 1854, Simon Hardcastle, made his will in the following terms:

I give all my property real and personal to my wife Eliza to be enjoyed by her during her natural life, and after her death I give to my adopted son George Wilson and his heirs one-half of the lot that I own on Spadina avenue together with the house erected on the said half-lot in which I now reside; and the other half of the said lot with the house erected on the last mentioned half-lot I give devise and bequeath to William and Philip Hopkins the sons of Reason Hopkins and their heirs after the death of my said wife. In this last-mentioned half-lot I have an estate in remainder expectant upon the death of Anne Hughes who has a life estate in the same,

Title—Continued.

and he died in January, 1885, leaving him surviving not only his own wife Eliza, but also the widow of James Hughes.

" Ann Hughes died in June, 1856, and upon her death Eliza Hardcastle took possession, and some time afterwards married again a man named Aaron Roberts.

" On the 8th November, 1867, Roberts and his wife executed a lease of the land in question for a term of fifteen years to one Parnell, reciting that Simon Hardcastle had been seized thereof in his life time, and by his will had devised the same to his wife for her natural life, and on the 15th December, 1870, this lease was assigned to one James Coleman.

" Aaron Roberts, the husband, having died, his widow on the 1st September, 1873, made another lease of the whole lot 55, to the same James Coleman for the term of her natural life. In the lease the land is described as more particularly described in the deed from William Reeve to the said Simon Hardcastle, registered No. 23919 (the deed above mentioned of the 3rd June, 1844) and it contains a recital that the lessor's former husband, Simon Hardcastle, had by his will devised the land to her for her life. This lease was afterward surrendered and on the 16th October, 1882, Mrs. Roberts made a new lease of the whole lot for the term of her natural life to one Mary Mulock, and this lease describes the land in the same manner and with the same recitals as the lease of September 1873, to Coleman.

" In 1882 and 1884 respectively the plaintiff acquired by purchase the estates in remainder of William and Philip Hopkins, named in the will of Simon Hardcastle as devisees in fee after the death of Mrs. Hardcastle or Roberts, and in 1888 he was negotiating with Mrs. Roberts, for a conveyance of her life estate, and the negotiations had gone so far that a quit claim deed to the plaintiff was prepared and approved of by Mrs. Roberts' solicitors, but it was not executed.

"Afterwards on the 22nd September, 1888, Mrs. Roberts by deed, expressed to be in consideration of \$5,000, conveyed the whole lot 55 in fee to her co-defendant Hayes, reciting therein that in or about the month of February, 1855, she entered into adverse possession thereof and has ever since demeaned herself as owner thereof, and continued and is now in undisputed possession and occupation of the same, whereby her title thereto has become absolute and indefeasible.

" Under these circumstances this action was brought on the 22nd of October, to determine the rights of the parties, and it came on for trial before Mr. Justice Rose, on the 12th January, 1889.

" To save expense the parties signed admissions of the facts to the effect stated above, with this qualification. The first admission is in these words: 'That James Hughes was in his life time the owner in fee of the north half of lot 55, Plan D 10, on the west side of Spadina Avenue, Toronto, which is the land mentioned in the plaintiff's statement of claim.' But the deed of June, 1834, conveying the whole lot to both Hughes and Hardcastle as tenants in common in fee was not produced or referred to. This admission without anything further might well be taken to mean that James Hughes was the sole owner of this land in his life time and at the time of his death, and accordingly

Title—Continued.

the case was argued before the learned trial judge upon that footing, and upon this supposition that when Hardcastle made his will he had no title or interest in the land but what he derived under the will of Hughes, viz., a life estate expectant on a prior life estate in Ann Hughes, and that having predeceased her he had nothing to devise, and that nothing did or could pass to any one by his will. Under these circumstances the question was whether, although nothing could pass by her husband's will, Mrs. Roberts (or Hardcastle) having entered and occupied as tenant for life under the will, was not estopped as against the plaintiff from denying that her husband had title, and whether she could set up the Statutes of Limitations against the plaintiff's estate in remainder.

"Mr. Justice Rose held that the defendants were estopped, and gave judgment for the plaintiff, and from that judgment the defendants appealed to the Divisional Court.

"While the case was before the Divisional Court the conveyance of the year 1844, was at the suggestion of the court produced in evidence, and that court expressing no dissent from the grounds on which Mr. Justice Rose had disposed of the case, held that it was manifest from the deed that Mrs. Roberts' possession was under the will of her husband and that she could not be allowed to set up the Statutes of Limitations against the plaintiff claiming under the same will.

"On the argument before us the appellant's counsel contended with great force that Hardcastle having no title to the land in question but a life estate, expectant on a prior life estate in Anne Hughes, and having predeceased her, had no interest whatever which he could dispose of by his will, and that when Mrs. Hughes died Hardcastle's widow could get nothing, not even possession by virtue of her husband's will, that she could take possession like any stranger, and if she did no one could turn her out but Hughes' heir-at-law, that just as she could get nothing under the will so neither could the Hopkinsons or the plaintiff claiming under them, and unless he could show some title from Hughes' heir-at-law, he must fail.

"The first question, however, is whether upon the evidence, as it stands now, Hardcastle had not a title when he made his will and when he died, quite independently of Hughes' will.

"I think the admissions signed by the parties of title in James Hughes in his life time, read in the light of the deed of 1844, under which his title was acquired, shows that while it was the fact that Hughes had title there was also title in Hardcastle, and that the latter had an estate in the land at the time of his death which passed by his will to his widow, now Mrs. Roberts, for life with remainder in fee to the Hopkinsons, who have conveyed to the plaintiff.

"This ground is sufficient to dispose of the case, and to dismiss the appeal; but I am also of the opinion that the judgment may well be supported on the ground on which it was rested by the trial judge, on the supposition that Hardcastle had no title when he made his will or when he died, but only a life estate. I think that on that supposition this case is not distinguishable from *Board v. Board*, L. R. 9 Q. B. 48, where the testator's title was, as here, a life estate, namely an estate by the curtesy, which ended at his death, and could

Title—Continued.

not pass by his will. Neither can it be said that the possession passed in that case, and so made it different from this, for in that case, if the testator was in possession at his death, which may be taken to have been the case, yet his possession necessarily ended with his death at the same moment as the title on which it depended.

"I do not think that case is affected by *Re Stringer's Trusts*, 6 Chy. D. 1, because it is distinguishable for the reasons explained by the learned chancellor in *Smith v. Smith*, 5 Ont. R. 695; see also *Clarke v. Adie*, L.R. 2 App. Cas. 435.

"I am therefore of opinion that the appeal should be dismissed with costs.

Above is set out at length the judgment of Maclellan, J. A., who delivered the judgment of the Court of Appeal for Ontario, Hagarty, C.J., and Osler, J.A., agreeing with that judgment and Burton, J., also concurring, resting his judgment on the first ground, but not expressing any dissent upon the second ground taken in the judgment, not having considered it.

On appeal to the Supreme Court of Canada, it was Held, as to the first ground taken by the Court of Appeal, that the evidence did not support it, for by the case in which the action was launched and by the admissions of counsel, as well as by the direct statement of Hardcastle's will, Hughes owned the north half of the lot in question. And as to the second ground, that Hardcastle, when he died having no estate or interest in the property, which could pass by his will or any possession, his widow entered as a stranger, and adversely to the heirs of Hughes; that the statements in the leases, which were statements made to strangers, could not prevent the statute from running in her favour against the heirs of Hughes, much less to give title to parties who would have taken in remainder under Hardcastle's will, if Hardcastle had owned in fee, or had had such possession as would have raised a presumption of ownership in fee; and therefore there was no case calling for any interference of the court to make a declaration as to the title of the lot in favour of the plaintiffs as against the defendants.

Per Patterson, J.—The judgment of the Court of Appeal proceeds upon grounds which would be of force if Hardcastle had died seized as did the testator in *Broad v. Broad*, L. R. 9 Q. B. 48, or had had possession so as to give operation to the principle of *Asher v. Whitlock*, L. R. 1 Q. B. 1, or had title of any kind as in *Paine v. Jones*, L. R. 18 Eq. 820.

Appeal allowed with costs.

Present.—Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

Hayes v. Coleman.—9th Dec. 1889.

8. Contract for exchange of lands—Time essence of contract—Waiver by negotiations as to title after expiration of time.
See SPECIFIC PERFORMANCE, 7.

9. Title to land—Purchase at tax sale—Cloud upon title—Agreement for quit-claim deed—Payment for deed—Right to monies paid.

J. R. died, leaving all his estate to his widow and, in the event of her death without having made a disposition thereof, to his surviving children.

Title—Continued.

The estate having become involved, an absolute deed of all the real estate was executed in favour of one of the testator's children by the widow and other children, the grantee undertaking to pay off the liabilities and improve the estate, and on being repaid all amounts advanced for that purpose, she was to re-convey the lands to all the heirs in equal proportions. The grantee managed the estate for several years, but was finally obliged to surrender it to trustees for benefit of creditors, it then owing her some \$18,000.

A portion of the estate conveyed by the said deed was sold for taxes, and the purchaser wished to obtain quit-claim deeds from the heirs of J. R. the original testator to perfect his title, and also to obtain title to 100 acres of timber land belonging to the estate of J. R. which was not included in the assignment for benefit of creditors. Similar quit-claim deeds had previously been given for portions of the lands, and the monies paid for the same were distributed in equal proportions among the surviving children and grandchildren of the testator, and in this case the deeds were prepared and executed by the heirs in favour of the purchaser at the tax sale. Before the money agreed to be paid for the same was received, however, the above mentioned deed executed by the widow and children of the testator, which had been mislaid for several years, the grantee under it having died, was discovered, and the children of the grantee claimed the whole of the said money, and an action was brought by the other heirs for their respective shares of the same. On the trial, judgment was given in favor of the plaintiffs, the trial judge holding that an agreement was proved between the parties that the money should be equally divided. This decision was affirmed by the Divisional Court, but reversed by the Court of Appeal for Ontario.

Held, affirming the decision of the Court of Appeal, that the purchaser at the tax sale paid the money in order to obtain a perfect title, and as the defendants were the only persons who could give such title, the legal estate being in them, the plaintiffs could not claim any part of the money, no agreement with the defendants to apportion it being proved, and any agreement made by the plaintiffs with the purchasers not being binding on the defendants.

Draper v. Radenhurst.—xxi. 714.

Tolls—Toll bridge—38 V. c. 97—Interference—Damages.

See FERRY, 5.

2. Road Company—Collector of tolls—Liability of company for negligence.

See NEGLIGENCE, 37.

3. 44, 45 V. c. 90 (P.Q.)—Toll-bridge—Franchise of—Free bridge—Interference by—Injunction.

By 44, 45 V. (P.Q.), c. 90, s. 3, granting to respondent a statutory privilege to construct a toll-bridge across the Chaudière River, in the parish of St. George, it is enacted that "So soon as the bridge shall be open to the public as aforesaid, during thirty years no person shall erect, or cause to be erected, any bridge or bridges, or works, or use or cause to be used any means of

Tolls—Continued.

passage for the conveyance of any persons, vehicles, or cattle, for lucre or gain across the said river, within the distance of one league above and one league below the bridge, which shall be measured along the banks of the river and following its windings; and any person or persons who shall build or cause to be built a toll-bridge or toll-bridges, or who shall use or cause to be used for lucre or gain, any other means of passage across the said river, for the conveyance of persons, vehicles, or cattle, within such limits, shall pay to the said David Roy three times the amount of the tolls imposed by the present Act for the persons, cattle or vehicles which shall thus pass over such bridge or bridges; and if any person or persons shall at any time, for lucre or gain, convey across the river any person or persons, cattle, or vehicles, within the above mentioned limits, such offender shall incur a penalty not exceeding ten dollars for each person, animal, or vehicle which shall have thus passed the said river; provided always that nothing contained in the present Act shall be of a nature to prevent any persons, cattle, vehicles, or loads from crossing such river within the said limits by a ford, or in a canoe or other vessel, without charge."

After the bridge had been used for several years. the appellant municipality passed a by-law to erect a free bridge across the Chaudière in close proximity to the toll-bridge in existence. The respondent thereupon by petition for injunction prayed that the appellant municipality be restrained from proceeding to the erection of a free bridge.

Held, affirming the judgments of the Superior Court and Court of Queen's Bench for L. C. that the erection of the free bridge would be an infringement of the respondent's franchise of a toll-bridge, and an injunction should be granted.

Aubert-Gallion v. Roy.—xxi. 456.

4. R. S. O. (1887) c. 159 (General Road Companies Act) as amended by 53 V. c. 42—Application to company incorporated by special charter—Collection of tolls—Maintenance of road—Injunction.

See CORPORATIONS, 47.

Tort—Petition of right will not lie for.

See PETITION OF RIGHT, 1, 10, 11, 15.

Tortfeasors—Joint—Action of damages against several mill owners for throwing sawdust and refuse into river and obstructing navigation and interfering with business of plaintiff as letter of boats—Reference to assess damages—General finding of Master against each of defendants.

See PRACTICE, 43.

Towage—Contract of.

See SHIPS AND SHIPPING, 5.

Towage—Continued.

2. "Vessel to go out in tow"—Insurance.

See INSURANCE, MARINE, 1.

3. Contract of, authority to make.

See MARITIME COURT OF ONTARIO, 8.

Trade—Restraint of—Foreign corporation—Exclusive right to operate telegraph line in Canada.

See CONTRACT, 36.

CORPORATIONS, 43.

Trade and Commerce.

See PARLIAMENT OF CANADA, 5.

Trade Mark—Infringement—Injunction.

B. *et al.* manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows: A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the reverse side. D. *et al.* manufactured cakes of soap similar in shape and general appearance to those of B. *et al.*, having stamped thereon an imperfect unicorn's head, being a horse's head, with a stroke on the forehead to represent a horn. The words "Very Best" were stamped, one on each side of the head, and the words "A. Bonin, 145 St. Dominique St." and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellant's soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."

Held, Henry, J., dissenting, reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of B. *et al.*'s trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain D. *et al.* from using the device adopted by them.

Barsalou v. Darling.—ix. 677.

2. *Action for infringement of, and for injunction—No resemblance likely to deceive ordinary purchasers*—42 V. c. 22, s. 4.

The appellant, a resident of the United States, manufactured a stove polish put up in small oblong cubical blocks, encased in a wrapper of red paper, on which was printed a vignette or picture of an orb rising above a body of water, and across the picture were the words "The Rising Sun Stove Polish." This comprised the appellant's trade mark, and the same was duly registered in the United States Patent Office, on or about the 8th July, 1870, and ever since that time the appellant used in the United States and in certain parts of Canada the trade mark in the form described.

Trade Mark—Continued.

On the 20th December, 1879, the appellant registered his trade mark with the Minister of Agriculture of Canada.

About the 22nd October, 1876, the defendant registered a trade mark for stove polish, called by him "The Sunbeam Stove Polish," without any cut or device resembling sunbeams or rays.

Afterwards, about the year 1877, the defendant put an indication of sunbeams upon his labels and upon his boxes containing packages of his stove polish.

This placing of the device of sunbeams upon the packages was the subject-matter of the complaint in the present action.

The action was brought for the purpose of recovering damages from the defendant, and for an injunction restraining him from placing the said device of sunbeams upon his stove polish.

The defence filed by the defendant in the Superior Court amounted to a denial that he took any portion of the appellant's trade mark as a device upon his packages of stove polish.

It was not pretended by the appellant that the packages in which the stove polish was put by the original defendant, resembled those in which the appellant's stove polish was put up, but it was urged that the appellant's stove polish was known throughout Canada and the United States as "The Rising Sun Stove Polish;" that persons hearing of the "Rising Sun Stove Polish," and enquiring therefor, could be deceived into taking "The Sunbeam Stove Polish" in lieu thereof, owing to the imitation of part of the device forming a portion of the appellant's trade mark, and that the device upon the boxes containing the original defendant's packages of stove polish was even a greater infringement of the appellant's trade mark than was the device upon the packages themselves.

The Superior Court for Lower Canada, Johnson, J., dismissed the plaintiff's action on the ground that he failed to show any infringement since the date of the registration of his trade mark, the 20th December, 1879, and that for any infringement prior to that date he was prevented from recovering by 42 V. c. 22, s. 4. The Court of Queen's Bench concurred in dismissing the action, but upon the merits.

On appeal to the Supreme Court of Canada, *Held*, affirming the judgment of the Court of Queen's Bench, that the trade mark used by the defendant did not resemble that of the plaintiff, or a substantial part of the plaintiff's, and was not calculated to lead a purchaser to believe that the goods on which it was placed were manufactured by plaintiff; in other words to deceive ordinary purchasers by enabling defendant to pass his goods as those of the plaintiff.

Appeal dismissed with costs.

Morse v. Martin.—January 12, 1885.

3. *Right to use one's own name—Goods designated by one's own name sold to deceive public.*

Gage carried on partnership with appellant, Beatty, a valuable asset of the business being a series of copy books designed by Beatty, and sold under

Trade Mark—Continued.

the name of "Beatty's Headline Copy Books." Beatty retired from the firm, receiving \$20,000 for his share in the business, and Gage subsequently registered as a trade mark the word "Beatty" in connection with the copy books.

After the dissolution, Beatty, under an agreement with the other appellants, the Canada Publishing Co., prepared a series of copy books which were sold under the name of "Beatty's New and Improved Headline Copy Books," and a suit was brought by Gage to restrain the appellants from selling the said books.

Held, affirming the judgment of the Court of Appeal, 11 Ont. App. R. 402, Henry and Taschereau, JJ., dissenting, that appellants had no right to sell "Beatty's New and Improved Headline Copy Books," with the name "Beatty" on the cover in such a position, or with such prominence of color or form, as might deceive purchasers into the belief that they were purchasing Gage's books.

Appeal dismissed with costs.

Canada Publishing Co. et al. v. Gage.—xi. 306.

4. *Infringement of—Effect of registration—Exclusive right of user—Property in descriptive words—Rectification of registry.*

It is only a mark or symbol in which property can be acquired, and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered as a trade mark under the Trade Mark and Design Act, 1879, 42 V. c. 22.

A person accused of infringing a registered trade mark may show that it was in common use before such registration and, therefore, could not properly be registered, notwithstanding the provision in s. 8 of the Act that the person registering shall have the exclusive right to use the same to designate articles manufactured by him. Taschereau, J., dissenting.

Where the statute prescribes no means for rectification of a trade mark improperly registered, the courts may afford relief by way of defence to an action for infringement.

Per Gwynne, J. Property cannot be acquired in marks, etc., known to a particular trade as designating quality merely and not, in themselves, indicating that the goods to which they are affixed are the manufacture of a particular person. Nor can property be acquired in an ordinary English word expressive of quality merely though it might be in a foreign word or word of a dead language.

Partlo v. Todd.—xvii. 196.

Trader—Transient—By-law of city of Quebec imposing license-fee on.

See LICENSE, 6.

2. **Meaning of, under Insolvent Act, 1875.**

See INSOLVENCY, 4.

Trading Voyage—

See INSURANCE MARINE, 4.

"Transaction"—*Arts. 1918, 1920, C. C.—Demolition of dam— Report of expert—Motion to hear further evidence—C. S. L. C. c. 51.*

The plaintiff, a riparian proprietor, brought an action against one L. to compel him to demolish a dam which L. had erected on the river Mille Isles, and to pay damages for injury caused by said dam. In this action judgment was rendered ordering the demolition of the dam and payment of damages. While the judgment was in appeal an agreement for settlement was arrived at between the parties by which it was agreed that the dam should be demolished by a certain day, failing which the judgment for demolition should be carried out. The property was subsequently sold to the defendant who bought with the full knowledge of the agreement in question, and agreed to be bound by said agreement and also by the judgment as if he had been a party thereto. The defendant, however, did not completely demolish the dam, but used a portion at one end and the foundation of it throughout for a new dam. The plaintiff then brought the present action against the defendant for the demolition of this second dam and for damages. In this action the Superior Court, after hearing a number of witnesses, appointed as expert an engineer who reported that the dam caused no injury to plaintiff's property. This report the court gave effect to, refusing a motion made by plaintiff asking leave to examine the expert and other witnesses for the purpose of showing the incorrectness of the report, and dismissed the action with costs on the ground that the defendant had only exercised the rights given him by c. 51 of the C. S. L. C., and the plaintiff had suffered no damage.

Held, per Fournier, Gwynne and Patterson, JJ., that c. 51 of C. S. L. C. had no application, the rights of the parties being regulated by the agreement for settlement arising out of the first action, which was a "transaction" within the meaning of Arts. 1918 & 1920 of the Civil Code.

Per Fournier and Gwynne, JJ.—On the whole evidence the plaintiff was entitled to judgment and the appeal should be allowed.

Per Ritchie, C.J., and Taschereau, J.—The appeal should be dismissed, but in any event all the plaintiff could ask was to have the case remitted to the court of first instance to take further evidence, which was the principal ground of his appeal to the Court of Queen's Bench as stated in his *factum*.

Patterson, J., while of opinion the law and evidence would have warranted a judgment for the plaintiff, concurred in the view that under the circumstances all the plaintiff could ask was to have the case remitted.

Hardy v. Fillatrault.—xvii. 292.

2. *Promissory notes—Consideration.*

C. having purchased Y.'s interest in certain lands which were in the city of Montreal, and upon which there was a mortgage of \$80,000, gave his promissory notes to Y. for the balance of the purchase price. Subsequently C. failed and Y. being liable for the mortgage, C. agreed to take the necessary steps to obtain Y.'s discharge from the mortgagees on a payment of one

“Transaction”—*Continued.*

thousand dollars, and Y. signed a document *sous seign privé*, dated 18th February, 1879, agreeing that all parties should be in the same position as if the deed of sale had never been passed. The mortgagees subsequently gave a discharge to Y. in conformity with the above agreement. In an action taken by Y. against C. on his promissory notes:

Held, affirming the judgments of the Superior Court for Lower Canada and the Court of Queen's Bench for Lower Canada (appeal side), that there was no consideration given for the notes and that C. was discharged from all liability under the document of the 18th February, 1879. See 33 L. C. Jur. 106.

Present: Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Yon v. Cassidy.—xviii. 713.

Treating—On polling day—Corrupt practice.

See ELECTION, 20.

Trees—Right of telegraph company to cut.

See TRESPASS, 7.

Trespass—Right of action for to wharf.

See NUISANCE, 1.

2. Action against speaker and members of Legislative Assembly.

See LEGISLATURE, 9.

3. Title by possession.

See LIMITATIONS, 2.

4. By individual corporators.

See CORPORATIONS, 7.

5. *Registration — Notice — Rev. Stats. N. S., 4th series, c. 79, ss. 9 & 19.*

R., the appellant, brought an action against H., the respondent, for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, etc. H. pleaded *inter alia*, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable re-joinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859, one C., who then owned R.'s property, granted by deed to H., the privilege of piercing the south wall, carrying his stovepipe into the flues and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than R.'s. R. purchased in 1872 the property from the Bank of Nova Scotia, who got it from one F., to whom C. had conveyed it—all these conveyances being for valuable consideration. The deed from C. to H. was not recorded until 1871, and R.'s solicitor, in searching the title, did not search under C.'s name after the registry of the

Trespass—Continued.

deed by which the title passed out of C. in 1862, and did not, therefore, observe the deed creating the easement in favour of the plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen.

Held, that the continuance of illegal burdens on R.'s property since the fee had been acquired by him, were in law, fresh and distinct trespasses against him, unless he was bound by the license or grant of C.

2. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registration Act, 4th series, R. S. (N. S.) c. 79, ss. 9 & 19, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and therefore from the date of the registration of the conveyance from N. to F. that the deed of grant to H. became void at law against F. and all those claiming title through him.

3. That to defeat a registered deed there must be actual notice or fraud, and there was no actual notice given to R. in this case such as to disentitle him to insist in equity on his legal priority acquired under the statute.

Per Gwynne, J., dissenting.—That upon the pleadings as they stood on the record, the question of the Registry Act did not arise, and that as the incumbrance complained of had been legally created in 1859, its mere continuance did not constitute a trespass, and that the action as framed should not be sustained.

Ross v. Hunter.—vii. 289.

6. Obstruction in harbor of Halifax.

See NAVIGATION, 1.

7. *Telegraph company—Erection of line—Right to cut trees—Company bound to show necessity—34 V. c. 52, incorporating Dominion Telegraph Co.*

The Act, 34 V. c. 52, incorporating the Dominion Telegraph Company, declares in the 4th section that the company may enter upon lands or places, and survey, set off and take such parts thereof as may be necessary for such line, etc., and in case of disagreement between the company and owners of lands so taken, or in respect of any damage done to the same, it may be settled by arbitration in the mode therein described. By section 20 the company are authorized and empowered to enter upon the lands of any person or persons, and survey and take levels, and to set out and ascertain such parts thereof as they shall think necessary and proper for making the said intended telegraph, and all such other works, matters and conveniences as they shall think proper and necessary for the making, effecting, preserving, etc., the said telegraph, and to build and set upon such lands, such station houses and observatories, watch houses and other works, etc., as and where the said company shall think requisite and convenient, etc. Provided always, that the said company shall not cut down or mutilate any tree planted or left standing for shade or ornament, or any fruit tree, unless it be necessary so to do, for the erection, use or safety of any of its lines.

Trespass—Continued.

In an action against the company to recover damages for cutting down ornamental trees, the defendants pleaded that the trees were standing by the side of a public highway, and the defendants were erecting their lines of telegraph along the highway; and because the trees were in the way and obstructed the passage of the line of telegraph, and because they deemed it necessary and advisable to do so, they committed the acts complained of by virtue of the statute and not otherwise.

The Supreme Court of New Brunswick, **Held, 1st.** That the arbitration clause in the 4th section did not apply to a case like this, where the complaint was that the defendants had wrongfully destroyed plaintiff's trees; **2nd.** That the proviso in the 20th section imposed on the defendants, if the ornamental trees should obstruct their line on the side of the highway where they located it, the burthen of showing that it was necessary for them to take it on that side, and that the defendant's pleas were bad for want of an averment that it was necessary to cut the trees, not merely that they deemed it necessary. (See 3 Pugs. & Bur. 553.)

On appeal to the Supreme Court of Canada, **Held,** that the judgment of the court below should be affirmed.

Appeal dismissed with costs.

The Dominion Telegraph Co. v. Gilchrist.—15th February, 1881.

8. Action of against sheriff.

See CONTRACT, 14.

9. *Trespass q. c. f., action for—Limitations, Statute of—Judgment entered for defendant, evidence of—Plaintiff's title to locus insufficient, and evidence of continuous possession by defendant sufficient.*

This was an action by L. P. F. for trespass for breaking and entering the plaintiff's close, described as certain land and land covered with water in Dartmouth, being and forming the bed, bank and waters of the stream leading from Dartmouth first Lake and falling into the waters of Halifax harbour, and breaking down and prostrating the fences and walls of plaintiff there standing upon the said close. The case was tried in 1878 before a jury, who were unable to agree and were discharged by the judge without rendering a verdict. No further proceedings were taken in the cause until November, 1878, when the plaintiff, as assignee in insolvency of said L. P. F., having intervened, it was ordered, by consent of parties, that a verdict should be entered for the plaintiff upon the minutes of the evidence taken on the said trial by the judge, and that the cause with said evidence should be remitted to the full court in *banc* at the next term thereof, who should have power to draw inferences of fact as a jury might and to enter judgment therein for either party, and, in case of said verdict for the plaintiff being sustained, the court should have power to fix the damages. The plaintiff claimed to be the legal owner of the *locus in quo*, under a deed from the Inland and River Navigation Company, executed by the President and Secretary of that company to said

Trespass—Continued.

L. P. F. on the first of April, 1870. The defendant claimed the same land under a deed from the executors of James Stanford, as land to which Stanford acquired a legal title by an exclusive and uninterrupted possession, commencing as far back as 1832, and continuing up to the time of his death in 1870.

The Supreme Court of Nova Scotia entered judgment for the defendant with costs.

On appeal to the Supreme Court of Canada, **Held**, affirming the judgment of the court below, that the plaintiff failed to shew beyond a reasonable doubt that the *locus in quo* was within the boundary of the canal property and included in the deed to L. P. F., but, on the contrary, the court below were justified in coming to an opposite conclusion; and further, that the court below were quite justified in coming to the conclusion that if the property was so included and the company ever had a title to the *locus*, there was evidence of such an exclusive and continuous possession that any such right or title was barred by the Statute of Limitations.

Appeal dismissed with costs.

Creighton v. Kuhn.—13th May, 1882.

10. *Trespass q. c. f.—Marsh lands—Possession—Accretion—Justification as commissioner of sewers under R. S. N. S. c. 40—“New work”—Sanction of proprietors.*

This is an action of trespass brought in the Supreme Court of Nova Scotia, on the 23rd day of June, 1881.

The land upon which the trespass in question in this cause is alleged to have been committed is a salt marsh lying outside of a dyked marsh, in the township of Falmouth, and between the dykes and the river Avon. It has been formed within the last forty years, or thereabouts, by an accumulation of mud gathered there from time to time, in front of the plaintiff's land, and extend southwardly and westwardly. It has been staked off for many years on the north-east, designating the division line between that part of it claimed and used for cutting grass by the plaintiff, on one side, and his neighbor Church on the other. It is bounded on the N. W. by the running dyke; on the N. E. by the stakes mentioned; and on all the other portions of it by the Avon river, and a certain creek called the Windmill Creek. After the mud had sufficiently accumulated grass began to grow, which was cut by the plaintiff's brother, George, now deceased, for years. George died five years before the trial, which took place in May, 1882, having first made his will, by which he devised to the plaintiff all his landed property that he died possessed of. The stakes were there since about 1855 or 1856, one of them being a solid, permanent one, and the others, if carried away, being replaced, from time to time, by new ones, taking the solid stake as a guide. The plaintiff and his brother, on one side of these stakes, and Church on the other, cut the grass year after year, or allowed others to do so, although the land does not appear to have yielded grass worth cutting till about 18 years before, one witness said 17. Since that time the plaintiff, either for his brother or for himself, cut and took away the grass growing there, or permitted others to do so. The defendant, who was commissioner of sewers, and acting as such, undertook to cut the

Trespass—Continued.

ditch in question through the property for the purpose of carrying away the water from the dyke, alleging that the means formerly used were inadequate for that purpose. At the trial defendant disclaimed any right personally, but sought to justify the cutting of the ditch as commissioner of sewers, claiming that the work came within the first part of the 4th s. of c. 40, Revised Statutes, (N.S.) which authorizes a commissioner to build or repair dykes, etc., and that it was not new work within the meaning of the last part of that section, which says that, "In case of the commencement of new work, two-thirds in interest, of the proprietors of the land shall first agree thereto." It was admitted that there was no such agreement: and, in answer to a question submitted to the jury by the learned judge, they answered that the work was new work.

The action was tried before Smith, J., and a verdict given for the plaintiff. A rule *nisi* for a new trial was taken out and was argued before the Supreme Court *en banc*, Macdonald, C.J., McDonald, Smith, Weatherbe and Rigby, JJ., composing the court. The said rule was discharged, Weatherbe, J., and Smith, J., dissenting.

On appeal to the Supreme Court of Canada, **Held**, that there was evidence establishing a continuous exclusive possession by the plaintiff, for many years, quite sufficient to enable him to maintain an action of trespass against a wrongdoer who interfered with that possession.

The question of "new work" was purely a question of fact for the jury, and they having found in the affirmative, their finding should not be reversed. The intention of the legislature in this Act would appear to be to empower the commissioners of sewers to act in making ordinary repairs, or in any sudden emergency, without consultation with or the consent of the proprietors, but that these proprietors should not be taxed for the construction of any new work not immediately essential to the preservation or interests of common property, without their consent to such work being first obtained.

As the defendant entered upon the plaintiff's property to perform this work, without the sanction of the proprietors first obtained, he could not justify the trespass under his commission.

Appeal dismissed with costs. Henry, J., dissenting.

Davison v. Burnham.—17th February, 1885.

11. Interim injunction in—Order quashing, not appealable.

See JURISDICTION, 38.

12. *Measurements and distances—Verdict set aside by court below on review of the evidence—New trial—Order for, not interfered with.*

Action of trespass and trover. The declaration alleged a trespass on certain lands claimed by the plaintiff, and had also a count in trover and a count for the trespass to personal property. The pleas traversed the allegations of trespass and conversion, and the allegations as to property in the plaintiff, and justified by title in some of the defendants.

Trespass—Continued.

The place of beginning in the plaintiff's grant was identified and the description then read "running south 52 chains to a large pine tree marked 'J. G.' and then west," etc. To reach the *locus* the line should be extended about 50 chains more. To that increased distance the surveyor's line on the ground extended, but there was no pine tree so marked either at the distance expressed in the description, or at the end of the surveyor's line. At the latter point, however, a spruce tree was marked "H. G." and "J. G." The plan attached to the grant represented the lot as a different shape from that claimed, and the area expressed in the grant was inconsistent with plaintiff's contention.

The cause was tried before Rigby, J., and a jury, and a verdict found for plaintiff. This verdict was set aside by the court *en banc*, McDonald, C.J., and Weatherbe and Thompson, JJ., holding that the plaintiff had given no evidence of title to the *locus*, and Rigby, J., holding that the preponderance of evidence was against plaintiff's contention. (5 Russ. & Geld. 481).

On appeal to the Supreme Court of Canada, Held, that there was evidence for the jury that the line claimed by the plaintiff was the western line of his grant. The case, however, was not so clear as to justify the court in reversing the decision of the court below, come to on a review of the evidence; but was a proper case for further consideration on a new trial. (Henry, J., dissenting).

Appeal dismissed with costs.

Gates v. Davidson.—12th May, 1885.

13. Water lots in Toronto harbour—Interference with use of, by owner—Navigation—Easement—Crown grant.

See NAVIGATION, 4.

14. Title—Declaration of—Description—Boundaries—Patent *improvidently* granted.

The action was brought for certain alleged trespasses charged to have been committed by the defendant during the winters of 1878-9, 1879-80, and 1880-1, upon land alleged by the plaintiff to be part of lots 84 & 85 in concession C, in the Township of Etobicoke, in the County of York and Province of Ontario, and to be his property. The plaintiff claimed damages for the cutting and removal of timber, and an injunction to restrain any future trespass.

The entry and cutting of some timber were, at the trial, admitted on the part of the defendant, but it was contended as alleged in his statement of defence, that the land in question was not part of lots 84 & 85 in concession C, but part of lots 84 & 85 in concession B, and was his property.

Both parties derived their title under one Henry John Boulton, who executed a mortgage bearing date April 30th, 1856, to one Samuel Foster, comprising among other lands "lots numbers thirty-four and thirty-five in concession B, in the township of Etobicoke."

A suit in chancery was brought for a foreclosure of that mortgage, and in that suit a final order was made March 1st, 1874, for the sale of the mort-

Trespass—Continued.

gaged lands, and under it lots 34 and 35 in concession B, in the township of Etobicoke, were sold to one James Metcalfe.

The said lots were conveyed to the said James Metcalfe in pursuance of such sale by the administrator and the sole devisee of the mortgagee Foster, by deed dated April 10th, 1875.

By deed dated May 8th, 1875, James Metcalfe conveyed to John Blackwell lots 34 and 35, in broken front, concession B.

By deed dated July 14th, 1875, the said John Blackwell conveyed to the defendant lots 34 and 35, in broken front, concession B.

By deed dated October 27th, 1867, after the mortgage from Boulton to Foster, Henry John Boulton, the mortgagor, conveyed to the plaintiff a parcel of land containing seven acres, more or less, composed of parts of lots numbers 34 and 35 in concession B, in the said township of Etobicoke, known as the Ox-bow, etc., describing it particularly by metes and bounds. This parcel, as described in this deed by metes and bounds, is the land in question in this action.

It was not disputed by the defendant that by this deed the plaintiff acquired the equity of redemption in the land in question subject to the mortgage from Boulton to Foster, but he contended that by the mortgage sale under the decree of the court, the title passed to the purchaser free from the equity as being a part of lots 34 and 35, in concession B., the whole of which lots were included in the mortgage and sold to Metcalfe.

The plaintiff, on the other hand, contended that the land in question, although erroneously described in the deed of it from Boulton to him, as forming part of lots 34 and 35, in concession B, really formed part of lots 34 and 35, in concession C, and was, therefore, not included in the mortgage from Boulton to Foster.

In the alternative the plaintiff contended that if the land in question did not form part of concession C, it formed part of broken front parcels of land lying in front of, and separate from lots 34 and 35 in concession B, and therefore, was not included in the mortgage from Boulton to Foster, which contains no mention of any broken front.

On the 2nd day of April, 1883, after the commencement of the action, the Crown granted to the plaintiff a piece of land said to contain $3\frac{1}{4}$ acres, and being the north bend of the Ox-bow or land in question, describing it by metes and bounds as being lot number thirty-five in concession C, of the township of Etobicoke.

Held, reversing the judgment of the court below, that the evidence established that there were no such lots as 34 and 35 in concession C; that the various descriptions in the patents and other title deeds also showed that the lands in dispute formed parts of lot 34 and 35, in concession B, and therefore the description in the mortgage from Boulton to Foster was sufficient to include such lands, and the defendant was entitled to a declaration that he was seized in fee of such lands; and that the patent issued on the 20th April, 1883, was void, as having been improvidently granted.

Appeal allowed with costs.

Johnson v. Orsborn.—April 9, 1886.

Trespass—Continued.

15. On wild lands—Isolated acts of—Title—Statute of Limitations.

See LIMITATIONS, 9.

16. Action of, for disturbing enjoyment of right of way—No exclusive user.

See EASEMENT, 5.

17. Title to land—Boundary—Easement—Agreement at trial to try question of boundary only.

See BOUNDARY, 4.

18. Title to land—Public highway—Dedication—Expropriation—Presumption—User.

See HIGHWAY, 2.

19. Agreement to operate lines of telegraph—*Trouble de droit*—Claim for reduction of rent.

See LEASE, 12.

20. *Trespass to land—Title—New trial—Misdirection—Misconduct of party at view of premises—Nominal damages.*

An action for trespass to plaintiff's land by placing ships' knees thereon whereby plaintiff was deprived of a use of a portion of said land and prevented from selling or leasing it. The defendants denied plaintiff's title. At the trial plaintiff gave no evidence of actual damage but claimed that an action was necessary to protect his title. Evidence was given to show that the alleged trespass was committed beyond the street line, and plaintiff claimed that the street had never been dedicated to the public and his ownership extended to the centre. Before the verdict was given the jury viewed the premises, one of the terms on which the view was granted being that "nothing said or done by any of the parties or their counsel should prejudice the verdict." The judge charged the jury strongly against the plaintiff and a verdict was given in favour of defendants. Plaintiff moved for a new trial on the grounds of misdirection and of improper conduct of one of the defendants at the view. The court below refused a new trial.

Held, affirming the judgment of the Supreme Court of New Brunswick, that plaintiff was precluded by the terms on which the view was granted from setting up misconduct thereat in support of the application; that there was no misdirection, and that as all plaintiff could obtain at a new trial would be nominal damages it was properly refused by the court below.

Simonds v. Chesley.—xx. 174.

- Trover—Action of, against sheriff—Transfer of property by execution debtor—Misdirection by jury.**

In an action of trover or conversion against appellant, high sheriff of the County of Cumberland, N.S., to recover damages for an alleged conversion by

Trover—Continued.

the appellant of certain personal property found in the possession of the execution debtor, but claimed by the respondent, the pleas were a denial of the conversion, no property in plaintiff, no possession or right of possession in plaintiff, and justification under a writ of execution against the execution debtor. The learned judge at the trial told the jury that he "thought it was incumbent on the defendant to have gone further than merely producing and proving his execution, and that if a transfer had taken place to the plaintiff, and the articles taken and sold, defendant should have shown the judgment on which the execution issued to enable him to justify the taking and enable him to sustain his defence."

Held, that the sheriff was entitled under his pleas to have it left to the jury to say whether the plaintiff had shown title or right of possession to the goods in question, and therefore there was misdirection.

McLean v. Hannon.—iii. 706.

See BILL OF LADING.

CHATTEL MORTGAGE.

Trusts and Trustees—Agent for sale of lands—Obtaining conveyance from pretended purchaser.

See SALE OF LANDS, 5.

2. Of Quebec Turnpike Roads.

See PETITION OF RIGHT, 6.
ROAD.

3. Contract by trustee for Crown.

See PETITION OF RIGHT, 7.

4. Land sold for joint benefit.

See SALE OF LANDS, 7.

5. Defendant sued as trustee of church property—Denial of quality by.

See PETITORY ACTION.

6. Assignment in trust—Legal title of Trustee as against equitable title of mortgage of chattels—Priority.

See CHATTEL MORTGAGE, 3.

7. Charitable trust—Grant of land for school.

See CHARITABLE TRUST.

8. Commutation fund—By-law of synod—Altering disposition of.

See COMMUTATION FUND.

Trusts and Trustees—Continued.

9. *Shares held in trust—Bank—Transfer to, as security, effect of—Mandatory and pledgee, obligations of—Action to account—Arts. 1755, 2268, C. C. (P.Q.)*

S. brought an action against the Bank of Montreal to recover the value of shares in the Montreal Rolling Mills Company, transferred to the bank, under the following circumstances. S.'s money was originally sent out from England to J. R., at Montreal, to be invested in Canada for her. J. R. subscribed for a certain amount of stock in the Montreal Rolling Mills Company as follows:—"J. Rose in trust," without naming for whom, and paid for it with S.'s money. He sent over the certificates of stock to S., and subsequently paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the bank as security for his indebtedness, some 850 shares of the Montreal Rolling Mills Company, and the transfer showed on its face that he held these shares "in trust." The Bank of Montreal then received the dividends, credited them to J. R., who paid them to S. J. R. subsequently became insolvent, and S., not receiving her dividends, sued the bank for an account.

Held, reversing the judgment of the court below. Strong, J., dissenting, that there was sufficient notice to the bank that J. R. was acting as agent or mandatory of S., and the bank not having shewn that J. R. had authority to sell or pledge the said stock, S. was entitled to get an account from the bank. Arts. 1755 and 2268, C. C.

[On appeal to the Privy Council the judgment of the Supreme Court was affirmed, 12 App. Cases 617].

Sweeney v. Bank of Montreal.—22nd June, 1895.—xii. 661.

See TRUSTS AND TRUSTEES, 14, 18, 23.

10. *Purchase by mortgagee at sale—Right of mortgagor to redeem—Trustee for sale—Limitations—R. S. O. c. 108, s. 19.*

See MORTGAGE, 16.

11. *Society of Friends, or Quakers—Lands held in trust for—Authority of governing body.*

See QUAKERS.

12. *Purchase of land—Joint purchase—Deed to one only—Resulting trust.*

See SALE OF LANDS, 24.

13. *Sale of land—No title in vendor—Valuable consideration—After acquired interest—Rights of purchaser.*

If a vendor, having no title to an estate undertakes to sell and convey it for valuable consideration his deed, though having no present operation either at law or in equity, will bind any interest which the vendor may afterwards

Trusts and Trustees—Continued.

acquire even by purchase for value in the same property, and in respect of such after-acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, and his heirs-at-law, will be compelled to convey to such purchaser accordingly. In other words the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. *Per Strong, J.*

McQueen v. The Queen.—xvi. 1.

See DEED, 10.

14. *Judgment—Bank shares held "in trust"—Substitution—Onus probandi—Res judicata—Art. 1241, C. C.*

The fact of bank shares being purchased in trust at a time when the trustee was solvent imports an interest in somebody else, and the onus is upon a party who has seized such shares to prove that they are in fact the property of the trustee, and as such available to satisfy the demand of his creditors. *Sweeney v. Bank of Montreal*, 12 App. Cas. 617, followed.

A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not *res judicata* as to the corpus of said shares nor as to the dividends of other shares claimed under a different title. *Art. 1241, C. C.*—Strong, J., was of opinion, in the case of *Holmes v. Carter*, that upon the facts shewn the judgment of the Court of Queen's Bench should be affirmed.

Muir v. Carter,
Holmes v. Carter. }—xvi. 478.

15. *Estoppel—Art. 19, C. C. P.—Right of suit by trustees (P.Q.)—Promissory notes given as collateral for price of sale—Prescription.*

C. H. (the respondent) as trustee for certain creditors of the firm of R. M. and sons, sued J. M. M. (the appellant), a member of the firm, for \$4,720, alleging: 1. A registered notarial transfer from one J.R.M. to him, as trustee, of a similar sum with all rights, mortgages, etc., thereunto appertaining, due by the said appellant to J. R. M. for the price of certain real estate in Montreal; 2. A transfer of certain promissory notes signed by the appellant for the same amount and representing the price of sale of said property, but which were to be in payment thereof only if paid at maturity. The appellant was a party and intervened to the deed of transfer and declared himself satisfied and subject to its conditions.

The appellant pleaded that the respondent had no action as trustee under article 19, C. C. P. and that the price had been paid by the two promissory notes which were now prescribed.

Held, 1, affirming the judgment of the court below, that article 19, C. C. P. was not applicable. The appellant having become a party to the registered transfer, which gave the respondent as trustee all mortgagee's rights, was estopped from denying the efficacy of such deed or of the right of the plaintiff

Trusts and Trustees—Continued.

to sue thereunder in his quality of trustee. *Burland v. Moffatt*, 11 Can. S. C. R. 76; *Browne v. Pinsonneault*, 8 Can. S. C. R. 108, and *Porteous v. Reynar*, 18 App. Cases, 120, distinguished.

2. That the notes in question having been given as collateral for the price of sale of the property, and the property not having been paid for, the plea of prescription as to the notes could not avail against an action for the price.

Mitchell v. Holland.—xvi. 687.

16. Trustees—Commission to—Rule of law.

In the Province of Nova Scotia prior to the passing of 51 V. c. 11, s. 69, the rule of English law relating to commission to trustees was in force, and no such commission could be allowed unless provided by the trust.

Power v. Meagher.—xvii. 287.

17. Conveyance in trust—Construction of—Lien on Railway—Unpaid vendor—Privilege.

See RAILWAYS AND RAILWAY COMPANIES, 55.

18. Commercial or Joint Stock company—Shares held "in trust" for minor—Sale of—Tutor—Arts. 297, 298 & 299, C. C.

Where a father, acting generally in the interest of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for certain shares in a commercial or joint stock company on behalf of the minor and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favor of the minor without any acceptance by or on behalf of the minor being necessary.

Such shares could not be sold or disposed of without complying with the requirements of Arts. 297, 298 & 299, of the Civil Code; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares.

The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to show that the title of the seller was not absolute and to put the purchaser on inquiry as to the right to sell the shares. *Sweeny v. The Bank of Montreal*, 12 Can. S. C. R. 661, see Trusts and Trustees, 9; 12 App. Cases 617, referred to and followed. Taschereau, J., dissenting.

Raphael v. McFarlane.—xviii. 183.

19. Mortgage by Trustee—Rights of mortgagee—Equities between trustee and cestui que trust—Indemnity.

See MORTGAGE, 27.

Trusts and Trustees—Continued.

20. Bank stock—Substituted property—Registration—Arts. 931, 938, 939, C.C.—Shares in trust—Condictio indebiti—Arts. 1047, 1048, C. C.

The curator to the substitution of W. Petry paid to the respondents the sum of \$8,632, to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust and which the said W. G. P. one of the *grêvés* and manager of the estate had pledged to respondents for advances made to him personally. J. H. P. *et al.*, appellants, representing the substitution, by their action demanded to be refunded the money which they allege H. J. P., one of them had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to show they formed part of the estate, and no *acte d'emploi* or *remploi* to show that they were acquired with the assets of the estate.

Held, per Ritchie, C.J., and Fournier and Taschereau, JJ., affirming the judgment of the Court of Queen's Bench for L. C. (appeal side) that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover. Arts. 1047, 1048, C. C.

Per Strong and Fournier, JJ.—That bank stock cannot be held as regards third parties in good faith to form part of substituted property on the ground that it has been purchased with the moneys belonging to the substitution without an act of investment in the name of the substitution and a due registration thereof. Arts. 931, 938, 939, C. C. Patterson, J., dissenting.

Petry v. La Caisse d'Economie de Notre-Dame de Quebec.—xix. 713.

21. Trustee—Conditions to be performed by *cestui que trust*—Failure of—Revocation by grantor.

By deed between B., grantor, of the first part, certain named persons, trustees, of the second part, and P., grantee, of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B., and performed certain conditions intended for the support or advantage and security of B. which by the deed he covenanted to perform, the trustees should convey the property to P., and it should be re-conveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions or of failure in the lifetime of both parties. In an action by B. to have this deed set aside, the trial judge held that B. when he executed it was ignorant of its nature and effect and set it aside on that ground. The full court, on appeal, dissented from this finding of fact, and varied the judgment by directing that the trustees should re-convey the property to B. on the ground that P. had failed to perform the conditions he had agreed to by the deed. On appeal to the Supreme Court:

Held, affirming the decision of the Supreme Court of British Columbia, that the conditions to be performed by P. were conditions precedent to his right to a conveyance of the property; that by failure to perform them the trust in his favour lapsed, and B., the grantor, being the only person to be

Trusts and Trustees—Continued.

benefitted by the trust, could revoke it at any time and demand a re-conveyance of the property.

Poirier v. Brula.—xx. 97.

22. Trust—Not expressed in deed—Parol evidence of—Enforcement—Findings of fact.

Suit brought to enforce an alleged trust in a deed absolute on its face, or, in the alternative, to have the property re-conveyed or sold according to the terms of the alleged agreement. The defendant claimed that he had given valuable consideration for the transfer to him of the property conveyed by the deed, and the plaintiff had accepted the same in full satisfaction and payment therefor.

At the trial parol evidence was given to establish the alleged trust and its existence was found as a fact by the trial judge who made a decree ordering the property to be sold and the proceeds applied as, according to the contention of the plaintiff, and the evidence in proof thereof, had been agreed upon. The full court (Supreme Court of British Columbia) affirmed this decree.

Held, that the fact of the existence of the trust having been found by the trial judge, and such finding having been affirmed by the full court, it should not be disturbed on this further appeal.

Bowker v. Laumelster.—xx. 175.

23. Transfer of stock—Shares held in trust—Duty of transferee to make inquiry.

D. transferred to brokers as security for a loan certain shares in a joint stock company, the transfer expressing on its face that it was in trust. The brokers pledged these shares with other stock to a bank as security for advances, and from time to time transferred them to other financial companies, each transfer on its face purporting to be "in trust." Eventually, the Federal Bank being the holders assigned D.'s shares, and others pledged by the brokers, by a transfer signed "B. manager in trust," to T. the manager of the respondent company, who accepted the transfer "in trust." D. brought an action to redeem them on payment of the amount of the loan to him from the brokers.

Held, reversing the decision of the Court of Appeal, Taschereau and Patterson, JJ., dissenting, that the form of the transfer to the loan company was sufficient to put them on inquiry as to the nature of the trust indicated, and they were only entitled to hold the shares of D. subject to payment of the amount he had borrowed on them. *Sweeny v. The Bank of Montreal*, 12 Can. S. C. R. 661; 12 App. Cas. 617, followed.

Held, *per* Taschereau and Patterson, JJ., that "manager in trust" on the transfer to the loan company only meant that the manager held the stock in trust for his bank, and that the transferee had a right so to regard it and was not put on the inquiry, even if such inquiry would have been possible in view

Trusts and Trustees—Continued.

of the shares not being numbered or identified in any way by which they could be traced.

Duggan v. London and Canadian Loan Co.—xx. 481.

[The Judicial Committee of the Privy Council has granted leave to appeal in this case.]

**24. Title to land—Judgment against estate for debt of executor—
Sheriff's sale—Purchase by executor—Possession taken by
devisee—Statute of limitations.**

Judgment was recovered against the executors of an estate on a note made by D. M., one of the executors, and indorsed by the testator for his accommodation. In 1849 land devised by the testator to A. M., another son, was sold under execution issued on said judgment and purchased by D. M. who, in 1853, conveyed it to another brother, W. M. In 1865 it was sold under execution issued on a judgment against W. M., and again purchased by D. M. In 1888 A. M., the devisee of the land under the will, took forcible possession thereof and D. M. brought an action against him for possession.

Held, affirming the decision of the Court of Appeal for Ontario, Strong, J., dissenting, that the sale in 1849 being for his own debt D. M. did not acquire title to the land for his own benefit thereby, but became a trustee for A. M., the devisee, and this trust continued when he purchased it the second time in 1865.

Held, also, that if D. M. was in a position to claim the benefit of the statute of limitations the evidence did not establish the possession necessary to give him a title thereunder.

McDonald v. McDonald.—xxi. 201.

**25. Devise to children and their issue—Possession of lands taken
by son one of the devisees and executors, but who had not
proved will nor disclaimed—Consent of acting executor and
trustee—Statute of limitations—Express trust.**

See WILL, 23.

**26. Mortgage of railway bonds as security for advances—Second
mortgage—Purchase by—Trust—Hypothecation of bonds
to bank.**

See RAILWAYS AND RAILWAY COMPANIES, 72.

**Tutor and Minor—Sale prior to 1st Aug. 1866—Action to annul
—Prescription—Arts. 2243, 2253, C. C.**

Held, affirming the judgment of the court below, Fournier and Henry, JJ., dissenting, that the action to annul a sale made in 1855 by a minor emancipated by marriage to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and mother) of her share in her mother's succession, was

Tutor and Minor—Continued.

prescribed by ten years from the date when the minor became of age.
Moreau v. Motz, (7 L. C. R. 147,) followed.

Gregoire v. Gregoire.—xiii. 319.

2. *Substitution—Minors—Tutor ad hoc—Intervention—Status—*
Arts. 269, 945, C. C.

In an action to account and for removal from trusteeship instituted by the party who had appointed the defendant trustee and curator to a substitution created by marriage contract, a tutor *ad hoc* to the minor children and *appellé* to the substitution has not sufficient quality to intervene in said suit to represent the minors. Art. 269, C. C., provides for the only case where a tutor *ad hoc* can be appointed to minors. Strong, J., dissenting.

Rattray v. Larue.—xv. 102.

3. *Loan to minor—Arts. 297 & 298, C. C.—Obligation—Personal*
remedy for moneys used for benefit of minor—Hypothecary
action.

Where a loan of money is improperly obtained by a tutor for his own purposes and the lender, through his agent who was also the subrogate tutor, has knowledge that the judicial authorization to borrow has been obtained without the tutor having first submitted a summary account as required by Art. 298, C. C., and that such authorization is otherwise irregular on its face, the obligation given by the tutor is null and void.

The ratification by the minor after becoming of age of such obligation is not binding if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor.

If a mortgage, granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action by the lender against a subsequent purchaser of the property mortgaged will not lie.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor when of age for the amount so loaned and used.

Davis v. Kerr.—xvii. 235.

4. *Shares held "in trust" for minor—Sale of—Tutor—Arts. 297,*
298 & 299, C. C.

See TRUSTS AND TRUSTEES, 18.

U.

Ultra vires.

See RAILWAYS AND RAILWAY COMPANIES, 1.
 LEGISLATURE.
 MARITIME COURT OF ONTARIO.
 PARLIAMENT OF CANADA.

Usage—Existence of.

See INSURANCE, MARINE, 1.

Use and Occupation—Action for—Mesne profits—Tenants in common.

See TENANTS IN COMMON.

2. Of land—Action for—Valuation.

See LAND, 8.

V.

Vendor and Purchaser.

See SALE OF GOODS.
 SALE OF LANDS.

2. *Action en restitution de deniers—Sale of personal rights without warranty—Sale for a bulk sum—Arts. 1510, 1517 & 1518, C. C.*

N. D., respondent, owner of a cheese factory, made an agreement with farmers by which the latter agreed to give the milk of their cows to no other cheese factory than to that of N. D. N. D. subsequently sold to G. D. (the appellant) the factory and *sous la simple garantie de ses fait et promesses*, whatever rights he might have under his agreement with the farmers, for the bulk sum of \$7,000. G. D. assigned to B. the factory and the same rights, but excluding warranty, *sans garantie aucune*, for \$7,500. A company was subsequently formed to whom B. assigned the factory and the rights, and one of the farmers to the original agreement having sold milk to another cheese factory, the company sued him, but the action was dismissed on the ground that N. D. could not validly assign personal rights he had against the farmers. Thereupon G. D. brought an action against N. D. to recover the price paid for rights which N. D. had no right to assign. At the trial it was proved that although the price mentioned in the deed and paid was a bulk sum for the factory and the rights, the parties at the time valued the rights under the agreement with

Vendor and Purchaser—Continued.

the farmers at \$5,000. G. D. also admitted that the action was taken for the benefit of the present owners of the factory.

Held, affirming the judgment of the court below, Strong and Fournier, JJ., dissenting, that inasmuch as the appellant, by the sale he had made to B., had received full benefit of all that he had bought from the respondent and had no interest in the suit, he could not claim to be reimbursed a portion of the price paid.

Per Taschereau, J.—If any action lay, it could only have been to set the sale aside, the parties being restored to the *status quo ante* if it were maintained.

Demers v. Duhaime.—xvi. 866.

3. Vendor of rolling stock for railway—Privilege as to payment.—Liability of trustees of company.

See RAILWAYS AND RAILWAY COMPANIES, 55.

4. Mortgage—Description of property—Omission by mistake—Rectification—Subsequent purchase—Conditions—Notice.

M. & B. owners of certain village lots of land were in possession of an adjoining water lot in a lake, the title to which was in the Crown and to which, according to the practice of the Crown Lands Department, they had a right of pre-emption. On this water lot they erected a mill on cribwork built on the bottom of the lake. A mortgage given to R. of the village lots and certain other lands was intended to comprise the water lot and mill but the latter were omitted by mistake of the solicitor who prepared the instrument. M. & B. afterwards executed separate instruments in the form of a chattel mortgage purporting to mortgage certain chattel property and the said mill to two other persons.

M. & B. having become insolvent assigned all their property for the benefit of their creditors and the assignee sold at auction all their property including the mill. The sale was made subject to certain printed conditions one of which was that as all the information relating to the titles of the property was set out in the schedules, stock list and inventory, the vendor would not warrant the correctness of the same and that no other claims existed "but the purchaser must take subject to all claims thereon, and whether herein mentioned or not, and subject to all exemptions in law." These conditions were signed by the purchasers, to whom the assignee executed a conveyance of all the property so sold. Before the sale the assignee had procured the two last above mentioned mortgages executed by M. & B. to be paid off by a person who advanced the money and he took an assignment to himself after the sale paying the amount out of the purchase money. The conveyance to the purchasers at the sale purported to be made in pursuance of all powers contained in these mortgages.

R., the mortgagee of the village lots, brought an action to have his mortgage rectified so as to include the water lot and mill property omitted by mistake. The purchasers at the auction sale set up the defence of purchase for valuable consideration without notice.

Vendor and Purchaser—Continued.

Held, affirming the decision of the Court of Appeal for Ontario, Gwynne and Patterson, JJ., dissenting, that there being ample evidence to establish, and the trial judge having found, that the mortgage was intended to cover the water lot and mill, and that the purchasers had notice of R's. equity before paying the purchase money and taking a conveyance, these facts must be taken to be established and the findings deemed final on this appeal.

Held, per Strong, J.—1. The water lot and mill thereon were capable of being mortgaged as real estate and might, in equity, be dealt with by an instrument in form of a chattel mortgage if sufficiently described, and the description "mill property" in the mortgages in question would pass the land covered with water on which the mill was erected.

2. In the case of charges upon equitable property where the legal estate is outstanding the defence of purchase for valuable consideration without notice is, in general, inapplicable, the rule being that all such charges take rank according to priority in point of time, but R., not having an actual charge but merely an equitable claim for rectification such defence was not precluded.

3. The purchasers at the sale could not set up want of notice in themselves and their immediate grantors without showing that the original mortgagees in whose shoes they stood were also purchasers for valuable consideration without notice.

4. By the condition of sale which they signed the purchasers incapacitated themselves from setting up this defence.

Present :—Sir W. J. Ritchie, C.J., and Strong, Taschereau, Gwynne and Patterson, JJ.

The Uttersson Lumber Co. v. Rennie.—xxi. 218.

Verdict—For excessive damages.

See JURISDICTION, 22.

2. **Against weight of evidence.**

See JURISDICTION, 23.

3. **Affirmed by two courts on weight of evidence not interfered with.**

See EVIDENCE, 21.

4. **Rule to reduce—Or for new trial.**

See SALE OF LANDS, 12.

NEW TRIAL.

LIBEL, 7.

• **EVIDENCE, 63.**

Vice-Admiralty—Court of—Jurisdiction to enforce penalties for illegal distilling.

See PARLIAMENT OF CANADA, 18.

Vis-Major—Plea of—Fall of wall after fire—Want of precautions to prevent—Arts. 17 ss. 24, 1053, 1055, 1071, C. C.

See NEGLIGENCE, 31.

Voluntary Payment.

See ASSESSMENT AND TAXES, 4.

W.

Wager.—By election agent.

See ELECTION, 20.

Wager Policy.—Life assurance for benefit of another—14 Geo. III. c. 48.

See INSURANCE, LIFE, 8.

Waiver.—Of notice of abandonment.

See INSURANCE, MARINE, 9.

2. Of condition in policy of insurance—Not within powers of agent or inspector.

See INSURANCE, FIRE, 18.

3. Of condition in policy of insurance—Production of magistrate's certificate.

See INSURANCE, FIRE, 19.

4. Condition in policy of marine insurance as to bringing action within one year—Waiver of, must be pleaded.

See INSURANCE, MARINE, 24.

5. Hypothecary action—Service of judgment—Absent defendant—Irregularity—Art. 476, C. C. P.—C. S. L. C., c. 49, s. 15.

See PRACTICE, 3.

6. Insurance against accident—Neglect to give notice—Refusal to pay on other grounds.

See INSURANCE, LIFE, 18.

7. Mechanics' lien—Materials supplied to contractor—Payment by promissory note—Suspension of lien.

See MECHANICS' LIEN, 2.

Warehouse Receipts.—*34 V. c. 5 (D.)—Right of property.*

At the request of the Consolidated Bank, to whom the Canada Car Company owed a large sum of money, M. consented to act as warehouseman to the company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted M. a lease for a year of a portion of their premises, upon which the wheels and iron were situate, in consideration of \$5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming when required, and he therefore issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank. It appeared that M. was a warehouseman carrying on business in another part of the city; that he acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank: and that he had not seen the property himself, but had sent his foreman to examine it before giving the receipt. In February, 1877, an attachment in insolvency issued against the company, and K. *et al.*, as their assignees in insolvency took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. M. then sued K. *et al.* in trespass and trover for the taking.

Held, *per* Strong, Taschereau and Gwynne, JJ., affirming the judgment of the Court of Appeal for Ontario, and that of the Court of Queen's Bench, that M. never had any actual possession, control over, or property in, the goods in question, so as to make the receipt given by M. under the circumstances in this case, a valid warehouse receipt within the meaning of the clauses in that behalf in the Banking Act.

Per Ritchie, C.J., and Fournier and Henry, JJ., *contra*, that M. *quoad* these goods was a warehouseman within the meaning of 34 V. c. 5, (D.), so as to make his receipt endorsed effectual to pass the property to the Standard Bank for the security of the loan made to the company in the usual course of its banking business.

Milloy v. Kerr.—viii. 474.

2. *34 V. c. 5, (D.) intra vires.*

The appellants discounted for a trading firm on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal as having been deposited by them, which was done, and the following receipt was given: "Received in store in Big Coal House warehouse at Toronto, from Merchants' Bank of Canada (at Toronto), fourteen hundred and fifty-eight (1458) tons stove coal, and two hundred and sixty-one tons chestnut coal, per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter,' and 'Annie Mulvey,' to be delivered to the order of the said Merchants' Bank to be endorsed hereon. This is to be regarded as a receipt under the provisions of Statute 34 V. c. 5—value \$7,000. The said coal in sheds facing esplanade is separate from and will be kept separate and distinguishable from other coal. (Signed), W. Snarr. Dated 10th August, 1878." The partnership having become insolvent, the assignee sought to hold the coal as the goods of the

Warehouse Receipts—Continued.

insolvents, and filed a bill impeaching the validity of the receipt. The Chancellor who tried the case found that the receipt given was a valid receipt within the provisions of the Banking Act, and was given by a warehouseman, and that the bank was entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for Ontario.

On appeal to the Supreme Court of Canada, **Held**, reversing the judgment of the Court of Appeal, that it is not necessary to the validity of the claim of a bank under a warehouse receipt, given by an owner who is a warehouseman and wharfinger and has the goods in his possession, that the receipt should reach the hands of the bank by indorsement, and that the receipt given by W. S. in this case was a receipt within the meaning of 34 V. c. 5, (D).

2. (Ritchie, C.J. and Strong, J., dissenting).—That the finding of the Chancellor as to the fact of W. S. being a person authorized by the statute to give the receipt in question should not have been reversed, as there was evidence that W. S. was a wharfinger and warehouseman.

3. *Per Fournier, Henry and Taschereau, JJ.*—That sections 46, 47 and 48 of 34 V. c. 5 (D.) are *intra vires* of the Dominion Parliament.

Merchants Bank of Canada v. Smith.—viii. 512.

3. Banking Act—R. S. C. c. 120, s. 53, *et seq.*—Disposal of surplus from sale of goods represented by receipts—Parol agreement as to—Arts. 1031, 1981, C. C.

See BANKS AND BANKING, 18.

4. Insolvency, knowledge of by creditor—Fraudulent preference—Pledge—Novation—Arts. 1975, 1034, 1035, 1036, 1169, C. C.

See INSOLVENCY, 32.

Warranty—Effect of in sale of timber limits and lands—C. C. Arts. 515, 518.

See SALE OF LANDS, 1.

2. No other insurance.

See INSURANCE, MARINE, 17.

3. On sale of land—Against charges and incumbrances—Subsequent promise to pay without reserve.

See SALE OF LANDS, 18.

4. Application for policy of insurance—Answers of applicant.

See INSURANCE, LIFE, 9.

Warranty—Continued.

5. *Action en restitution de deniers*—Sale of personal rights without warranty for a bulk sum—Arts. 1510, 1517 & 1518, C. C., (P. Q.).

See VENDOR AND PURCHASER, 2.

6. Application for life insurance—Reference to in policy—Misstatement.

See INSURANCE, LIFE, 15.

7. Life insurance—Unconditional policy—Effect of misrepresentations.

See INSURANCE, LIFE, 16.

8. Or representation—Fire insurance—Statement in application.

See INSURANCE, FIRE, 27.

Water Lots—In Toronto harbour—Trespass—Easement—Navigation.

See NAVIGATION, 4.

Water Rights—Land ordinance, 1865—Grant of water under—Riparian owners—Right to exclusive use of stream—Unoccupied water—Proof of notice of application for grant.

See RIPARIAN PROPRIETORS, 5.

Way—Of necessity—Adjoining lands—License—Prescription—Construction of agreement.

See EASEMENT, 6.

Wild Lands—Isolated acts of trespass—Title—Statute of Limitations.

See LIMITATIONS, 9.

Will—Construction—Remoteness—Estate tail—Heir-at-Law.

P. F., sen., proprietor of 180 acres of Lot 13, 10th Concession of the Township of Drummond, Lanark Co., by a will, dated 3rd December, 1845, devised as follows: "It pleased the Lord to give me two sons equally dear to my heart; to give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line, to him I bequeath it, and to him I will that it pass free of any encumbrance, except the burying ground and the quarter of acre for a place of worship. To Duncan Ferguson, my son, I bequeath my family bible and five shillings over and above what I have done for him. . . . To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to

Will—Continued.

occupy the farm and answer State dues and public burdens himself, and the lawful male offspring of his body until the proper heir are come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber whatsoever kind away off the land, or bringing any other family on to it but his own. But if he leaves a situation so advantageous, and cannot maintain himself upon it. . . . I appoint Peter McVicar, my grandson, to take charge of the whole place—farm and all that pertains to it—and occupy the same for his own benefit and advantage, according to the fore-mentioned restrictions and conditions, until the heir be of lawful age as aforesaid.” The testator died in 1849, leaving two sons, D. and P., jun., and three daughters and one grandson, P. McV., being a son of a daughter. When the testator died the property was subject to a lease, which expired in 1857. P. F., jun., after having gone into occupation, in that year conveyed his interest to P. McV. and left the place. Subsequently, the appellant, son of D. F., and heir-at-law of P. F., senr., took a conveyance from P. McV., and thereupon the respondent, heir-at-law of P. F., junr., brought an action in ejectment, claiming that under the will his father took an estate tail which descended to him. The Court of Queen’s Bench gave judgment in favour of the heir-at-law, which judgment was reversed by the Court of Appeal for Ontario.

Held, on appeal, that the devise by the testator to his first great grandson being void for remoteness, and there being no intention to give to P. F., jr., any estate or interest independent of, or unconnected with, the devise to the great grandson, there was no valid disposition to disinherit the heir-at-law and therefore the plaintiff was not entitled to recover. Strong, J., dissenting.

Per Ritchie, J.—Where the rule of law, independent of and paramount to the testator’s intentions, defeats the devise, the proper course is to let the property go as the law directs in cases of intestacy.

Ferguson v. Ferguson.—ii. 497.

2. Ejectment—Statute of limitations—Acceptance of deed by person in possession—“Any issue of his body lawfully begotten or children of such issue surviving him”—Question not raised at trial.

In 1830 James Gray took possession of east half of lot No. 18, in the 1st concession of East Hawkesbury. He resided on the west half of said lot with his sons, and occasionally assisted in working the whole lot, until his death, which occurred in 1857. In 1847-48, while his son Adam was working the east half, and in possession, James Gray devised it to him by will, and the land was known as “Our Adam’s.” In 1857 James Gray made a second will, in which he said: “I give and devise to my son John Gray, his heirs and assigns, etc., to have and to hold the premises above described to the said John Gray, his heirs and assigns forever. But if my said son John should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then in such case I will and devise the said, etc., to my son Thomas Gray, his heirs and assigns, to have and to hold the same at the death of the said John Gray.” After the father’s death Adam remained in

Will—Continued.

possession, and in 1862 he accepted a conveyance with full covenants for title from John. On 15th September, 1868, Adam conveyed to A. McC., one of the respondents, and R., the other respondent, claimed title under A. McC., as landlord. In 1874 John died without leaving any lawful issue, and on the 5th May, 1875, Thomas (appellant) brought ejectment against respondents, but neither at the trial nor in term was any question raised as to the effect of John's deed.

Held, 1. That James Gray, the father, at the time of his death had acquired a title to the lot by length of possession. That, under the will, John Gray, took an estate in fee, with an executory devise over to Thomas Gray, in the event that happened of John Gray dying without leaving lawful issue.

2. That Adam, having recognized, in 1862, John's interest in the land by purchasing from him, by deed of bargain and sale, a limited and contingent estate, its effect was to stop the running of the statute, and the respondents cannot set up Adam's possession under John to defeat the contingent estate.

3. That the Court of Appeal could not refuse to entertain the question as to the effect of John's deed, although not raised at the trial nor in term.

Gray v. Richford.—ii. 431.

3. *Administratrix with will annexed, purchase of real estate by, when personal assets of testator sufficient to pay off incumbrance—Subsequent parol agreement to sell part of said land null—Compensation money for land, right to and how to be treated—Revised Statutes of Nova Scotia, 4th series, c. 36, s. 40.*

About 1837 Andrew McMinn devised his lands to his wife, Mary McMinn, for life with remainder to Maria Kearney. Letters of administration with the will annexed were granted to the widow. At the time of testator's death the lands were mortgaged for £150. A suit to foreclose this mortgage was instituted after the testator's death, and it was alleged that under it a foreclosure was obtained, and the property sold, and purchased by the administratrix for £905. There was evidence that the administratrix received personal assets of the testator sufficient to have paid off the mortgage, had she chosen so to apply them. The sum of £725 was lent to the administratrix by Ann Kean, her daughter by a former marriage. The administratrix then sold the property to the public authorities for £1,750, out of which she paid her daughter £400. From 1858 the daughter, with the leave of the administratrix, occupied about $\frac{1}{2}$ of an acre of the land, until, in 1873, under the authority of an expropriation Act, she was ejected from it, the commissioner taking in all 3 acres $\frac{1}{4}$ ths of this property, the balance being in the occupation of Maria Kearney, and her husband, Francis Kearney (the appellants). These 3 acres $\frac{1}{4}$ ths were appraised at \$2,310, and that sum was paid into court to abide a decision as to the legal or equitable rights of the parties respectively. Ann Kean, claimed a title to the whole of the land taken under an alleged parol agreement with her mother, that she should have the land in satisfaction of £325, the residue unpaid of the loan of the

Will—Continued.

£275, and obtained a rule nisi for the payment to her of the sum of \$2,310, the amount awarded as a compensation for the land. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to the appellants in the whole property, reserving a rental of \$80 a year and liberty to occupy two rooms in a dwelling house then occupied by her. On a motion to make this rule absolute, several affidavits were filed, including those of the appellants. On the 18th January, 1875, the matter was referred to a master to take evidence and report thereon, subject to such report being modified by the court or a judge. The master reported that the appellants had the sole legal and equitable rights in the property. On motion to confirm that report, the court made an order apportioning the \$2,310 between Ann Kean and the appellants, the former being declared entitled to be paid \$1,015.61, and the latter, on filing the written consent of Mrs. McMinn, the residue of the \$2,310.

Held, on appeal, 1st. That the administratrix, having personal assets of the testator sufficient to discharge the mortgage, was bound in the due course of her administration to discharge said incumbrance, and that the parol agreement made by her with her daughter was null and void.

2nd. That when the land is taken under authority of legislative provisions similar to Revised Statutes of Nova Scotia (4th Series), c. 86, s. 40, *et seq.*, the compensation money, as regards the capacity of married women to deal with it, is still to be regarded in equity as land.

Kearney v. Kean.—iii. 332.

4. Construction of—Tenants in common or joint tenants—Costs.

By will J. H. A. directed :—" Until the expiration of four years from the time of my decease, and until the division of my estate as hereinafter directed, my executors shall every year place to the credit of each of my children the sum of sixteen hundred dollars, and if any of my children shall have died, leaving issue, then a like sum to and among the issue of the child so dying, such sum of sixteen hundred dollars to be paid by half yearly instalments to such of my children as shall be of age or be married; but if any advances shall have been made to any of them, and interest shall be due thereon, such interest to be deducted from the said sum of sixteen hundred dollars. As regards the division, appropriation, and ultimate disposition of my estate, it is my will that, subject to the payment of my just debts and legacies, bequests and annuities, I have heretofore given or may hereafter give, and to the expenses of the management of my estate, all the rest, residue and remainder of my estate, and the interest, increase and accumulation thereof, be distributed, settled, paid and disposed of, to and among my children who may be alive at the time of the division and appropriation into shares of my estate hereinafter directed, and the issue then living of such of my children as may be then dead, at the time and in the manner following, that is to say; that immediately, on the expiration of four years from my death, my executors, after making such provision as may be necessary for the payment of any debts and legacies that may be outstanding and unpaid, and of outstanding annuities, and of the expense of the management of my estate, shall divide all my remaining estate into as many just and equal shares as the number of my then surviving

Will—Continued.

children and of my children who shall before them have died, leaving lawful issue then surviving, shall amount unto, and shall apportion and set off one such share to each of my said then surviving children, and one such share to the lawful issue of each of my then deceased children, whose lawful issue shall be then surviving, all the issue of each deceased child standing in the place of such deceased child. And it is my will, and I direct, that from henceforth a separate account shall be kept by my trustees of each share, and of the interest and profit thereof, and the payments made to or on account of or for the maintenance and education of each of my said children or issue, shall be charged against the share apportioned to such child or children, or wherein such issue shall be interested, so that all accumulations and profits that may arise shall enture to the increase of each several share on which such accumulation or profit shall accrue—it being my intention that after such division shall take place, the maintenance, education and support of each of my children while under the age of twenty-one years shall be drawn from the separate income of such child, and the maintenance and education of the children of any of my children who may have before them died, leaving issue, shall be drawn from the shares or shares set apart for the issue of such deceased child or children. And that my children, and such issue of deceased children being of age, that is to say, of the age of twenty-one years, or when respectively they shall attain the age of twenty-one years, shall be severally entitled to receive for their own use the whole of the interests and profits of the share and proportion of my estate to which they may be respectively entitled." On 26th May, 1864, M. L. A., testator's daughter, married C. H. F., appellant. Testator died 24th December, 1870. On 25th August, 1872, testator's daughter died, leaving three children H. A. F., E. B. F. and W. S. F. On the 14th September, 1877, H. A. F., the eldest son of appellant and M. L. A., died. Thereupon the appellant claimed that the three brothers took their mother's share under the will as tenants in common and the property being personal property, H. A. F.'s share vested in the appellant, his father.

Held, that the intention of the testator was that his estate should be divided, and that the children of testator's daughter took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in the appellant.

Fisher v. Anderson.—iv. 406.

5. *Annuities, sale of corpus to pay.*

J. R. died on the 3rd August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21st July, 1876. By the will he devised to his widow an annuity of \$10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules, marked respectively, A, B, C, D and E, annexed to his will, upon these trusts, viz.: Upon trust, during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate, during the life of the testator's wife, the executors were to pay to each of his five

Will—Continued.

daughters the clear yearly sum of \$1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provided, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter M. M. A., the rents, etc., apportioned to her in schedule A.; to his daughter E. of those mentioned in schedule B.; to his daughter M. of those mentioned in schedule C.; to his daughter A. of those mentioned in schedule D.; and to his daughter L. of those mentioned in schedule E.; each of the said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words:—"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following." He then gave out of the residue a legacy of \$4,000 to his brother D. R., and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters, as were thereinbefore declared, with respect to the said estate in the said schedules mentioned. The rents and profits of the whole estate left by the testator proved insufficient, after paying the annuity of \$10,000 to the widow, and the rent of and taxes upon his house in L., to pay in full the several sums of \$1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the *corpus*, or apply the funds of the *corpus* of the property, to make up the deficiency.

Held, on appeal, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

Almon v. Lewin.—v. 514.

6. *Construction of—Surplus—Whether residuary personal estate of the testator passed.*

Among other bequests the testator declared as follows:—"I bequeath to the Worn out Preachers' and Widows' Fund in connection with the Wesleyan Conference here the sum of £1,250, to be paid out of the moneys due me by Robert Chestnut, of Fredericton. I bequeath to the Bible Society £150. I bequeath to the Wesleyan Missionary Society in connection with the Conference the sum of £1,500." Then follow other and numerous bequests. The last clause of the will is: "Should there be any surplus or deficiency, a *pro*

Will—Continued.

rata addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund, Wesleyan Missionary Society, Bible Society." When the estate came to be wound up it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed on the one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a *pro rata* addition should be made to the three above-named bequests, statutes of Mortmain not being in force in New Brunswick. (Fournier and Henry, JJ., dissenting).

Ray et al. v. The Annual Conference of New Brunswick, etc.—vi. 308.

7. Validity of—Insanity—Legacy to wife—Error—False cause—Question of fact on appeal—Duty of Appellate Court.

P. L., executor under the will of the late W. R., sued W. C. A., curator of the estate of W. R. during the lunacy of the latter, to compel W. C. A. to hand over the estate to him as executor. After preliminary proceedings had been taken, E. R. (the appellant) moved to intervene and have W. R.'s last will set aside, on the ground that it had been executed under pressure by D. J. M., W. R.'s wife, in whose favour the will was made, while the testator was of unsound mind. The appellant claimed and proved that D. J. M. was not the legal wife of W. R., she having another husband living at the time the second marriage was contracted. W. B., who was a master pilot died in 1881, having made a will two years previously. His estate was valued at about \$16,000. On the 4th October, 1878, W. R. made a will by which he bequeathed \$4,000 and all his household furniture and effects to his wife, J. M.; \$2,000 to his niece, E. R.; \$1,000 to F. S. for charitable purposes, and the remainder of his estate to his brothers, nephews, and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving \$800 to his wife J. M., \$400 to each of his nieces, M. and E. R., and \$400 to his brother, with reversion to the nieces if not claimed within a year, and the remainder to E. R. On the 17th November, 1878, W. R. made another will, which is the subject of the present litigation, and by which he revoked his former wills and gave \$2,000 to F. S., for the poor of the parish, of St. Rochs, and the remainder of his property to his "beloved wife, J. M." On the 10th January following, W. R. was interdicted as a lunatic, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released, and lived until his death with his niece, E. R., sister of the appellant. Chief Justice Meredith upheld the validity of the will, and his decision was affirmed by the Court of the Queen's Bench.

On appeal to the Supreme Court of Canada, **Held**, 1. Reversing the judgments of the Courts below, Ritchie, C.J., and Strong, J., dissenting, that the proper inference to be drawn from all the evidence as to the mental capacity

Will—Continued.

of the testator to make the will of the 21st November, was that the testator, at the date of the making of the will, was of unsound mind.

2. That, as it appeared that the only consideration for the testator's liberality to J. M. was, that he supposed her to be "my beloved wife, Julie Morin," whilst at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void, through error and false cause.

8. That it is the duty of an Appellate Court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case.

[An application for leave to appeal was refused by the Judicial Committee of the Privy Council].

Russell v. Lefrançois.—viii. 335.

8. *Construction of—Art. 889, civil code—Liability of universal legatee for hypothec on immoveables bequeathed to a particular legatee.*

On the 80th April, 1869, H. S. being indebted to J. P. in the sum of \$3,000, granted a hypothec on certain real estate which he owned in the city of Montreal. On 28th June, 1870, H. S. made his will, in which the following clause is to be found: "That all my just debts, funeral and testamentary expenses be paid by my executors, hereinafter named, as soon as possible after my death." By another clause he left to W. H. in usufruct, and to his children in property, the said immoveables which had been hypothecated to secure the said debt of \$3,000. In 1879 H. S. died, and a suit was brought against the representative of his estate to recover this sum of \$3,000 and interest.

Held, reversing the judgment of the Court of Queen's Bench, Strong, J., dissenting, that the direction by the testator to pay all his debts included the debt of \$3,000 secured by the hypothec.

Per Fournier, Taschereau and Gwynne, JJ.—When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, Art. 889 of the C. C., does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee.

Harrington v. Corse.—ix. 412.

9. *Construction of—Executor, powers of—Prohibition to alienate—Art. 972: C. C. (P.Q.).*

By the 3rd clause of her will, H. M., the testatrix, disposed of all her property, moveables, and immoveables, in favour of her children as universal legatees. The legacy was subject to the extended powers of administration conferred by the fifth clause of the will (referred to in the statement of the case) and also to the power to alter the disposition in favour of the testatrix's children given by the same clause to her husband H. L., the executor and also

Will—Continued.

by the will the executor was exonerated from the obligation of making an inventory and rendering an account. H. L., in his quality of testamentary executor and administrator to the estate of the said H. M., endorsed accommodation promissory notes signed by C. L., one of his children, and the respondent, as holder thereof for value, obtained judgment against both the maker and indorser. An execution was subsequently issued against H. L., *asqualité*, and certain real estate of the late H. M., which he detained in his said capacity, was seized and advertised for sale. J. D. L. *et al.* (the appellants) who are the only children of the defendant H. L., and his wife, opposed the sale of the property seized on the ground that the said property was *insaisissable*.

Held, reversing the judgment of the court below, Taschereau and Gwynne, JJ., dissenting, that the endorsements were not authorized by the will, and that the clause in the will, exempting the property of the testatrix from execution, is valid, and must be given effect to. Art. 972, C. C.

Lionels v. Nelson's Bank.—x. 526.

10. Institute—Substitute—Revendication—Prescription—Possession in good faith—Art. 2268, C. C. (P. Q.).

On the 27th Oct., 1828, Suzanne Pepin, widow of Toussaint Dufresne, made her will in authentic form, by which she instituted her eleven children her universal legatees; one of the said children being Jean Baptiste Dufresne, the father of the plaintiffs. The will contained the following clause concerning the property bequeathed to the children:—“*Pour être partagé également, pour iceux en jouir leur vie durant, pour après leur mort, retourner et appartenir à leurs enfants nés et naître en légitime mariage, ou à leurs héritiers suivant la loi.*” The testatrix died on the 29th July, 1884, and her will was published (*lu et publié*) on the 15th April, 1885. A partition took place between her eleven children, and the lot of land mentioned in the declaration of the plaintiffs fell to Jean Baptiste Dufresne, their father, who had the enjoyment of the land up to the time of his death, on the 5th March, 1872.

The said Jean Baptiste Dufresne left eight children, the plaintiffs being six of them.

The will of Suzanne Pepin having created a substitution in favour of her grandchildren, the plaintiffs renounced to the succession of their father, Jean Baptiste Dufresne, and claimed all the rights that might accrue to them as substitutes in virtue of the will of their grandfather, and they took possession of the lot of land above referred to.

During his enjoyment of the said lot of land in virtue of the will of his mother, Jean Baptiste Dufresne by two deeds, dated respectively the 18th Dec., 1866, and 8th Oct., 1868, sold to the defendants the right to work, draw and carry away all the sand that could be found in certain parts of the said lot of land described in the said deeds. The defendants opened sand pits on the said property and removed all the valuable sand which could be found during the period from 1867 to 1870.

Will—Continued.

The plaintiffs claimed that their father, Jean Baptiste Dufresne, as institute to the substitution created in their favour by the will of Suzanne Pepin, had no right to make the above sale, and claimed from the defendants the value of the sand so removed.

The Superior Court of the Province of Quebec rendered judgment in accordance with the respondents' conclusions. The Court of Queen's Bench for that province (appeal side) confirmed the judgment of the Superior Court in principle, reducing the amount awarded by two-eighths, in respect of the shares of a daughter not properly represented in the cause, and of a son who had ratified the sales made by his father.

Held, affirming the judgments of the courts below, that the substitute has on the opening of the substitution a personal action, founded on the obligation which the law imposes upon the institute (*grévé*) to restore the property, to compel the latter to deliver to him any property detached from the land and so converted into moveables which remains in specie in his possession, or to indemnify him in money for any property so detached which may have gone into the hands of *tiers détenteurs*.

As against *tiers détenteurs* of moveables detached from the land which is the subject of substitution, the substitute has a real action, an action of revendication, for the recovery of his property. In such an action alternative conclusions may be taken that the *tiers détenteur* may deliver the thing sought to be recovered, or, if being a possessor in bad faith he has ceased to possess by consuming the thing, or by disposing of it to another, that he may be made to pay damages. If it is alleged in the action that the thing has already been destroyed, consumed, or converted, then the first alternative conclusion may be suppressed.

As regards prescription, the action of the substitute falls under article 2268 C. C., and the *tiers détenteur* of moveable property subject to substitution, in order to avail himself of prescription must show possession in good faith for three years from the date of the opening of the substitution before the institution of the action. The publication and insinuation of the will of Suzanne Pepin was not sufficient notice from which to presume bad faith, which must be proved, but the contracts of sale of 18th December, 1866, and 8th October, 1868, described the property as belonging to the "succession Dufresne," and this was sufficient to put them in bad faith, as they had no right to assume their *auteur* was the absolute proprietor.

Appeal dismissed with costs.

Bulmer v. Dufresne.—9th May, 1879.

11. Will, construction of—Legacy—Condition.

A testator, by the 3rd clause of his will, devised and bequeathed the residue of his estate to his wife, four sons and two daughters, the devise and bequest being subject to the condition that they should all unite in paying to the executors, before the 1st January, 1877, the sum of \$1,600, and the same sum before the 25th January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the 4th clause he gave the sum of \$1,600, without condition, to each of his sons, Alexander and Duncan. By the 5th clause, he devised to his sons, Douglas and Robert, two lots; and after giving

Will—Continued.

several legacies to his daughters, he proceeded: "And further that Alexander and Duncan work on the farm until the legacies become due." Alexander left the farm in 1871 and entered into mercantile pursuits.

Held, reversing the judgment of the Court of Appeal for Ontario (6 Ont. App. R. 595), Ritchie, C.J., and Henry, J., dissenting, that the construction of the paragraph in the will, bequeathing the \$1,600 to Alexander must be based on a consideration of the whole will, and that the intention was that Alexander's right to receive his legacy was conditional on his working on the farm and assisting in earning it.

Oliver v. Davidson.—xi. 166.

12. Removal of executrix for wasteful and fraudulent administration.

See EXECUTOR, 5.

13. *Construction of—Contingent interest.*

T. McK., a testator, having previously given all his estate, real and personal, to trustees in trust for his wife for life, or during her widowhood, made a devise as follows:—"In trust also, that at the death, or second marriage of my said wife, should such happen, my son Thomas, if he be then living shall have and take lot number 1, etc., which I hereby devise to him, his heirs, and assigns to and for his and their own use for ever." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children; provided always, that in the event of any child dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:—"All other my lands, tenements, houses, hereditaments, and real estate," etc.

Held, Ritchie, C.J., and Fournier, J., dissenting, reversing the judgment of the court below, *Keefer v. McKay*, 9 Ont. App. R. 117, that the interest devised to Thomas was contingent upon his surviving his mother.

Merchants' Bank v. Keefer.—12th Jan'y, 1885.—xiii. 515.

14. *Will, construction of—Devise to creditor of certain specific lands and of unascertained chattels not superseded—Satisfaction.*

The will of the late John Severn by clause "B" provided as follows:—

"I devise all the lands situate in said village of Yorkville, and particularly described in the first schedule hereto, unto my son George, his heirs and assigns, together with their actual and reputed appurtenances, or with the same or any part thereof, held, used and occupied or enjoyed, or known, taken

Will—Continued.

or considered as part or parcel thereof, together also with all and all manner of engines, fixtures, utensils and implements, and the appurtenances and stock in trade therein, or in or about the premises at my decease, he or they paying in exoneration of any other estate, any incumbrances which at the time of my decease shall affect the same, and this devise to be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease."

Clause "L" provided: "And it is my will and desire that, if at any time between the day of the date of this my will and the time of my decease, any sale or other disposition of any of the said lands and premises herein specifically devised by me shall be made by me, the consideration money received therefor in money or otherwise, to the amount thereof, or the value thereof, shall be a charge upon the whole of my real estate, and shall become due and payable to the devisee to whom the said land is herein specifically devised, or to his or her heirs, executors, administrators or assigns, within five years after my decease, with interest after the first year of my decease, the securities (if any) received in part or whole payment of such consideration, if any being at the time of decease, to be transferred, conveyed and assigned to the said devisee, his or her executors, administrators or assigns, and to be by him, her or them received as to the amount then owing thereon in part or in whole payment of the said consideration money as the case shall be."

Between the date of the making of the will and the death of the said John Severn, the said testator sold the said properties specifically devised by Clause "B" of the said will, comprising a brewery and stock and plant therein, to his son George, the appellant, the purchase money paid thereon being the sum of \$33,987.20 and it was contended on the part of the appellant that, to the extent of this sum of \$33,987.20, the said appellant was entitled, under Clause "L" of the said will, to a charge upon the estate of the testator.

The Court of Appeal for Ontario Held, reversing the judgment of Ferguson, J., that in effecting the sale to the appellant, the testator made a sale in a manner not contemplated by him at the date of the making of the said will; and that by the said will the said testator provided in Clause "L" for a sale by himself to some third person, and that the testator intended when entering into the agreement with the appellant to supersede the devise referred to in favour of the appellant, and that the effect of the sale was to accomplish that purpose. (See 8 Ont. App. R. 725).

On appeal to the Supreme Court of Canada, Held, reversing the judgment of the Court of Appeal, that the devise of the lands was not superseded—Gwynne, J., dissenting. But the appellant was not entitled to the value of the stock and plant in the brewery, in the event of their sale to him in the testator's lifetime, because what was given to him was not, as in the case of lands, certain specific ascertained property, but only fluctuating and unascertained property, that is, such property as should be on the premises at the time of the testator's decease.

Appeal allowed with costs of all parties out of the estate.

Severn v. Archer.—16th February, 1885.

Will—Continued.

15. Devisee—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under 5 Geo. II. c. 7—Conveyance by purchaser at sale—Assignment of mortgage—Statute confirming title—R. S. (N.S.) 4th Series, c. 36, s. 47.

See SALE OF LANDS, 17.

16. *Will, construction of—Legacy—Alienation of property bequeathed by testator, effect of—Partition—Estoppel.*

W. F. by his will bearing date 11th February, 1838, *inter alia* devised to M. his daughter by an Indian woman and to E. and M., his daughters by another woman, a defined portion of the seigniories of Temiscouata and Madawaska, and the balance of said property to his sons W. and E. A short time after making his will the testator, who was heavily in debt, received an unexpected offer of £15,000 for the said seigniories, and he therefore sold at once, paid his most pressing debts, amounting to £5,400 and the balance of £9,600 was invested by loaning it on security of real estate. At his death, his estate appearing to be vacant as regards the £9,600, a curator was appointed. On the 27th September, 1839, the parties entitled under the will proceeded to divide and apportion their legacies, basing their calculations upon the approximate area of the seigniories devised, and received the collected part of the sums allotted to each by the partition. In an action brought by W. F. the respondent, who was residuary legatee, against the curator in order to make him render an account, the court ordered the curator to render an account, which he did, and he deposited \$50,000 and other securities. On a report of distribution being made W. F. (the respondent) filed an opposition claiming his share under the will. This opposition was contested by J., the appellant, on the grounds: 1st. That the legacies were revoked and that in his capacity of universal legatee to his mother (the legitimate child, he alleged, of the testator, and the Indian woman who was *commune en biens* with the testator) he was entitled to one-half of the proceeds of the said £9,600; and 2nd. that in the event of his claim to legitimacy and revocation of the legacy being rejected, as by the will the daughters were exempt from the payment of the debts, he should, as representing one of the daughters, be entitled to her proportion of £15,000, the net proceeds of the sale.

Held, affirming the judgment of the court below, that J. (the appellant), not having at the death of his mother repudiated the *partage* to which she was a party, but on the contrary having ratified it and acted under it, was estopped from claiming anything more than what was allotted to his mother.

Per Strong, Fournier and Taschereau, JJ.—That under the law prior to the Code the sale of the seigniories which were the subject of the legacy in question in this cause, had not, considering the circumstances under which it was made, the effect of defeating the legacy. *Semble*, *per* Henry, J.—That there was a revocation of the legacy.

The judgment of the court below held that as the testator declared that the daughters should not be liable for the payment of his debts, partition, as

Will—Continued.

regards them, should be made of the sum of £15,000, the price obtained from the sale of the seigniories bequeathed, and not of the £9,600 remaining in his succession at his death. On cross appeal to the Supreme Court of Canada, **Held**, that on the pleadings before the court no adjudication could be made as to the sum of £5,400 paid by the curator for the debts, and that in the distribution of the moneys in court all that J. (the appellant) could claim to be collocated for, was the unpaid balance (if any) of his mother's share in the moneys, securities, interest, and profit of the said sum of £9,600 in accordance with the *partage* of the 27th September, 1839.

Jones v. Fraser.—xiii. 342.

17. Devise under—Absolute—Subsequent restriction—Repugnancy.

A testator directed his real estate to be sold and the proceeds, after payment of debts and certain legacies, to be divided into twelve equal parts, "five of which I give and devise to my beloved daughter C. M., four of which I give and devise to A. E. F., (daughter), and three of which, subject to the conditions and provisions hereinafter set forth, I reserve for my son C. W. M. But in no case shall any creditor of either of my children, or any husband of either of my children, daughters, have any claim or demand upon the said executors, etc., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually * * * during their respective lives." In an action by the daughters to have their shares paid over to them untrammelled by any trust.

Held, affirming the judgment of the court below, that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives.

Foot v. Foot.—xv. 699.

18. Trustees under, in Province of N. S. prior to 51 V. c. 11, s. 69—Commission to—Rule of law.

See TRUSTS AND TRUSTEES, 16.

19. Contingent interest—Protection against waste.

By his will a testator provided as follows :

"I give, devise and bequeath unto my dear wife J. all and singular my real and personal estate, property, monies, etc., etc., to have and to hold the same, etc., to my said wife J. her heirs, executors, administrators and assigns forever.

"And my will is further that in case there should be any child or children of my deceased brother M., formerly of, etc., living at the time of the decease of my said wife, then that such child or children should receive out of the proceeds of my said property at her decease the sum of three thousand pounds, Halifax currency."

D. the only child of M. during the lifetime of the testator's wife brought suit to protect his legacy against dissipation of the estate by the widow.

Held, reversing the judgment of the court below, that D. had more than a possibility or expectation of a future interest ; he had an existing contingent

Will—Continued.

interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended.

Duggan v. Duggan.—xvii. 343.

20. Construction of—Devise—Joint tenancy or tenancy in common—Evidence to establish—Admissibility of.

A will devised certain property to the testator's two sons, their heirs, etc., and provided that the devisees should jointly and in equal shares pay the testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of 2, 3, 4, 5, 6 and 7 years respectively. The estate vested before the statute abolishing joint tenancies in Nova Scotia came into operation.

Held, reversing the decision of the court below, Taschereau and Gwynne, JJ., dissenting, that these provisions for payment of debts and legacies indicated an intention on the testator's part to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. *Fisher v. Anderson*, 4 C. S. C. R. 406, followed.

On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised evidence of a conversation between the devisees, which plaintiff claimed would show that a severance was made after the estate vested, was tendered and rejected as being evidence to assist in construing the will.

Held, Gwynne, J., dissenting, that it was properly rejected.

Held, *per* Gwynne and Patterson, JJ., that the evidence might have been received as evidence of a severance between the devisees themselves if a joint tenancy had existed.

Clark v. Clark.—xvii. 376.

21. Construction of—Transfer—Effect of—Sale of rights—Mandatory—Negotiorum gestor—Parties to suit for partition—Art. 920, C. C. P.—Purchase by curator—Art. 1484, C. C.

In 1871, C. Z. D., one of the institutes under the will of G. D. died without issue, and by his will made the defendant his universal legatee. Plaintiff claimed his share in the estate of G. D. under a deed of assignment made by defendant to plaintiff in 1862 of all right, title and interest in the estate.

Held, that the plaintiff did not acquire by the deed of 1862 the defendant's title or interest in any portion of C. Z. D.'s share under the will of 1871.

Held, further, that under the will of the late J. D., C. Z. D.'s share reverted either to the surviving institutes or to the substitutes, and that all defendant took under the will of C. Z. D. was the accrued interest on the capital of the share at the time of his death.

By the judgment appealed from, the defendant was condemned to render an account of his own share in the estate which he transferred to plaintiff by notarial deed in 1862, and also an account of C. D.'s share, another institute

Will—Continued.

who in 1862 transferred his rights to the plaintiff. The transfer made by the defendant was in his capacity of co-legatee of such rights and interests as he had at the time of the transfer, and he had at that time received the sixth of the sum for which he was sued to account.

Held, reversing the judgment of the court below, that the plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in action to account as the mandatory or *negotiorum gestor* of the plaintiff.

2. F. D. and E. D., having acquired an interest in C. Z. D.'s share after they had transferred their share to the plaintiff in 1869, the plaintiff could not maintain his action without making them parties to the suit. Art. 920, C. P. C.

Per Taschereau, J.—Quere; Were not the transfers made by the institutes E. D., F. D. and C. D. to the plaintiff while he was curator to the substitution null and void under Art. 1484, C. C.?

Dorion v. Dorion.—xx. 430.

22. Devise of land without estate therein—Action for declaration of title—Possession—Statute of Limitations.

See TITLE, 7.

23. Will—Construction—Devise to children and their issue—Per stirpes or per capita—Statute of Limitations—Possession.

Under the following provisions of a will. "When my beloved wife shall have departed this life and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money . . . and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto:"

Held, reversing the judgment of the Court of Appeal for Ontario, Ritchie, C.J., dissenting, that the distribution of the estate should be *per capita* and not *per stirpes*.

A son of the testator and one of the executors and trustees named in the will was a minor when his father died, and after coming of age he never applied for probate though he knew of the will and did not disclaim. With the consent of the acting trustees he went into possession of a farm belonging to the estate and remained in possession over twenty years, and until the period of distribution under the clause above set out arrived, and then claimed to have a title under the Statute of Limitations.

Held, affirming the decision of the Court of Appeal, that as he held under an express trust by the terms of the will, the rights of the other devisees could not be barred by the statute.

Houghton v. Bell.—April 4th, 1892.

Will—Continued.

24. Agreement to provide for grand-daughter by will—Services rendered—Specific performance—Remuneration *quantum meruit*.

See SPECIFIC PERFORMANCE, 6.

25. Executor—Incumbrance on property of estate by—Judgment against executor by Legatee—Priority of, over personal creditors of executors—"Balance and remainder of the property and of any estate" Words "property and estate" both sufficient to pass realty.

See EXECUTORS, 18.

26. Construction—Usufruct—Sheriff's sale—Effect of—Art. 711, C. C. P.

The will of the late J. McG. contained the following provisions :

"Fifthly.—I give, devise and bequeath unto Helen Mahers, of the said parish of Montreal, my present wife, the usufruct, use, and enjoyment during all her natural lifetime of the rest and residue of my property, moveable or immoveable, . . . which I may have any right, interest or share at the time of my death, without any exception or reserve.

"To have and to hold, use and enjoy the said usufruct, use, and enjoyment of the said property unto my said wife, the said Helen Mahers, as and for her own property, from and after my decease and during all her natural lifetime.

"Sixthly.—I give, devise and bequeath in full property unto my son, James McGregor, issue of my marriage with the said Helen Mahers, the whole of the property of whatever nature or kind, moveable, real, or personal, of which the usufruct, use, and enjoyment during her natural lifetime is hereinbefore left to my said wife, the said Helen Mahers, but subject to the said usufruct, use and enjoyment of his mother, the said Helen Mahers, during all her natural lifetime as aforesaid, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever. Should, however, my said son, the said James McGregor, die before his said mother, my said wife, the said Helen Mahers, then and in that case I give, devise and bequeath the said property so hereby bequeathed to him to the said Helen Mahers in full property to be disposed of by last will and testament or otherwise as she may think fit, and without any account to be rendered of the same or of any part thereof to any person or persons whomsoever.

"To have and to hold the said hereby bequeathed and given property to the said James McGregor, his heirs and assigns, should he survive his said mother, as and for his and their own property forever, and in the event of his predeceasing his said mother unto the said Helen Mahers, her heirs and assigns, as and for her and their property forever."

Will—Continued.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), 1 R. Q. (1892) 197, that the will of J. McG. did not create a substitution, but a simple bequest of usufruct to his wife and of ownership to his son.

Held, also, that a sheriff's sale (*d'envoi*) of property forming part of J. McG.'s estate under an execution issued against a person who was in possession under a title from the wife, such sale having taken place after J. McG.'s son became of age, was valid and purged all real rights which the son might have had under the will. Art. 711, C. C. P., *Patton v. Morin*, 16 L. C. R. 267, followed.

McGregor v. Canada Investment and Agency Co.—xxi, 499.

Winding-up—Of insolvent bank under Imperial Companies Act, 1862.

See CORPORATIONS, 15.

2. Of insolvent bank under 45 V. c. 23 (D.).

See BANKS AND BANKING, 7.

3. Right of set off by shareholder in action against—45 V. c. 23, s. 76 (D.).

See BANKS AND BANKING, 8.

4. Of insolvent bank—Priority of Crown—Not taken away by 45 V. c. 23 (D.).

See CROWN, 15.

5. Winding-up Act—Company—Winding up order—Notice to creditors, etc—45 V. c. 23, s. 24.

It is a substantial objection to a winding up order appointing a liquidator to the estate of an insolvent company under 45 V. c. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by s. 24 of said Act, and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew.

Per Gwynne, J., dissenting, that such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this court.

Shoolbred v. Union Fire Ins. Co.—xiv, 624.

6. 45 V. c. 23—47 V. c. 39—Winding-up of insolvent bank—Proceedings in case of.

Sections 2 & 3 of the Winding-up Act, 47 V. c. 39, providing for the winding up of insolvent companies do not apply to banks, but an insolvent bank whether in process of liquidation or not at the time it is sought to bring it under the Winding-up Act, must be wound up with the preliminary proceedings

Winding-up—Continued.

provided for by ss. 99 to 102 of 45 V. c. 28, as amended by 47 V. c. 39 (2).
Strong and Gwynne, JJ., dissenting.

Mott v. Bank of Nova Scotia.—*In re* the Bank of Liverpool.—xiv. 650.

7. *Winding-up Act—Bank—Shareholders in—Winding up—R. S. C. c. 129—Contributory—Calls on—Double liability—Set-off—Bank Act—R. S. C. c. 120.*

A contributory of an insolvent company, who is also a creditor, cannot set off the debts due to him by the company against calls made in the course of winding-up proceedings in respect of the double liability imposed by the Banking Act, Revised Statutes of Canada, c. 120.

The Maritime Bank v. Troop.—xvi. 456.

8. *Winding-up Act—R. S. C. c. 129—Application of to provincial company—Winding-up proceedings—Reference to master.*

A company incorporated by the legislature of Ontario may be put into compulsory liquidation and wound up under the Dominion Winding-up Act, R. S. C. c. 129.

In assigning to provincial courts or judges certain functions under the Winding-up Act, Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master.

Shoolbred v. Clarke.—*In re* Union Fire Ins. Co.—xvii. 265.

9. *Winding-up Act, R. S. C. c. 129, s. 3—Constitutional law—Foreign corporations—Liquidation.*

Section 3 of "The Winding-up Act," Revised Statutes of Canada c. 129 which provides that the Act applies to . . . incorporated trading companies doing business in Canada wheresoever incorporated is *intra vires* of the Parliament of Canada.

2. A winding-up order by a Canadian Court in the matter of a Scotch company incorporated under the Imperial Winding-up Acts doing business in Canada, and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor with the consent of the liquidator previously appointed by the court in Scotland as ancillary to the winding-up proceedings there is a valid order under the said Winding-up Act of the Dominion. *Merchant's Bank of Halifax v. Gillespie*, 10 Can. S. C. R. 312, distinguished.

Allen v. Hanson.—*In re* the Scottish Canadian Asbestos Co.—xviii. 667.

10. *Winding-up Act—R. S. C. c. 129—Insolvent bank—Appointment of liquidators—Right to appoint another bank—Discretion of judge.*

The Winding-up Act provides that the shareholders and creditors of a company in liquidation shall severally meet and nominate persons who are to

Winding-up—Continued.

be appointed liquidators and the judge having the appointment shall choose the liquidators from among such nominees. In the case of the Bank of Liverpool the judge appointed liquidators from among the nominees of the creditors, one of them being the defendant bank.

Held, affirming the judgment of the Supreme Court of Nova Scotia (22 N. S. Rep. 97) that there is nothing in the Act requiring both creditors and shareholders to be represented on the board of liquidators; that a bank may be appointed liquidator; and that if any appeal lies from the decision of the judge in exercising his judgment as to the appointment such discretion was wisely exercised in this case.

Present: Sir W. J. Ritchie, C.J., and Strong, Fournier, Gwynne and Patterson, JJ.

Forsythe v. The Bank of Nova Scotia (In re The Bank of Liverpool)
—May 6, 1890.—xviii. 707.

11. Of foreign company—Manager—Possession of books by—Refusal to deliver up.

See EVIDENCE, 48.

12. *Winding-up Act—Joint and several debtors—Insolvency—Distribution of assets—Privilege—R. S. C. c. 129, s. 62.—Deposit with bank after suspension.*

Held, per Ritchie, C.J., and Taschereau, J., affirming the judgment of the Court of Q. B. for L. C. (appeal side), Strong and Fournier, JJ., *contra*, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.

Per Gwynne and Patterson, JJ., that a person who has realized a portion of his debt upon the insolvent estate as one of his co-debtors, cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his co-debtor. R. S. C. c. 129, s. 62. The Winding-up Act.

Held, also, affirming the judgment of the court below, that a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

Ontario Bank v. Chaplin.—xx. 152.

13. *Prerogative—Exercise of local government by—Provincial rights.*

The government of each province of Canada represents The Queen in the exercise of her prerogative as to all matters affecting the rights of the province. *The Queen v. The Bank of Nova Scotia*, 11 Can. S. C. R. 1, followed. Gwynne, J., dissenting.

Winding-up—Continued.

Under s. 79 of the Bank Act, R. S. C. c. 120, the note-holders have the first lien on the assets of an insolvent bank in priority to the crown. Strong and Taschereau, JJ., dissenting. But *see* the present Bank Act, 53 V. c. 81, s. 53, passed since the decision.

Liquidators of The Maritime Bank v. The Receiver-General of New Brunswick.
—xx. 695.

Witness—Refusal to answer questions on cross-examination—Improper ruling—Misdirection.

Plaintiff (respondent), a teller in a bank in New York, absconded with funds of the bank, and came to St. John, N. B., where he was arrested by the defendant (appellant), a detective residing in Halifax, N. S., and imprisoned in the police station for several hours. No charge having been made against him he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his wife, read to her a telegram and demanded and obtained from her money she had in her possession telling her that it belonged to the bank, and that her husband was in custody. In an action for assault and false imprisonment and for money had and received, the defendant pleaded, *inter alia*, that the money had been fraudulently stolen by the plaintiff at the city of New York, from the bank, and was not the money of the plaintiff; that defendant as agent of the bank, received the money to and for the use of the bank, and paid it over to them. Several witnesses were examined, and the plaintiff being examined as a witness on his own behalf, did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his so doing would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the questions proposed. The learned judge then told the jury that there was no identification of the money, and directed them that if they should be of opinion that the money was obtained by force or duress from plaintiff's wife they should find for the plaintiff.

Held, Henry, J., dissenting, that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.

Power v. Ellis.—vi. 1.

2. Right of two counsel to cross-examine the witness.

See CONTRACT, 4.

3. Cross-examination of witness—Contradiction.

See CRIMINAL APPEAL, 4.

Words, Construction of—Income.

See ASSESSMENT, 6.

2. Good merchantable timber.

See AGREEMENT, 1.

Words, Construction of—Continued.**3. Wilful offence.**

See ELECTION, 8.

4. At owner's risk.

See RAILWAYS AND RAILWAY COMPANIES, 6.

5. Go out in tow.

See INSURANCE, MARINE, 1.

6. On view.

See PARLIAMENT OF CANADA, 4.

7. Trader.

See INSOLVENCY, 14.

**Workmen's Compensation for Injuries Act (Ont.), 49 V. c. 28—
Applicable to the Canada Southern Ry. Co.**

See RAILWAYS AND RAILWAY COMPANIES, 50.

APPENDIX A.

CASES BROUGHT BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THE SUPREME COURT OF CANADA FROM THE ORGANIZATION OF THE COURT IN 1875 TO JULY 1ST, 1893.

	REPORT IN SUP. CT.	REPORT IN PRIV. C.	RESULT.
Alexander v. Yve	16 S. C. R. 501		Leave to appeal refused.
Arpin v. The Queen	14 S. C. R. 746	10 Gaz. 275	Leave to appeal refused.
Atty. Gen. of British Columbia v. Atty. Gen. of Canada	14 S. C. R. 345	14 App. Cas. 295; 58 L. J. 88; 60 L. T. 712; 5 Times L. R. 385	Reversed.
Atty. Gen. of Nova Scotia v. Gregory	S. C. Dig. 727	11 App. Cas. 229; 55 L. J. 40; 55 L. T. 270	Leave to appeal refused.
" " Ontario v. Mercer	5 S. C. R. 538	8 App. Cas. 567; 52 L. J. 84; 49 L. T. 312	Reversed.
" " Quebec v. Reed	8 S. C. R. 408	10 App. Cas. 141; 54 L. J. 12; 52 L. T. 383; 33 W. R. 618	Affirmed.
Bank of Montreal v. Sweeney	12 S. C. R. 661	12 App. Cas. 617; 56 L. J. 79; 56 L. T. 897	Affirmed.
Banque du Peuple, The Exchange Bank of Canada v.	S. C. Dig. 79	9 Gaz. 394	Leave to appeal refused.
Barrett v. The City of Winnipeg	19 S. C. R. 374	[1892] A. C. 445; 61 L. J. 58; 67 L. T. 429	Reversed.
Beatty, The North West Transportation Co. v.	12 S. C. R. 598	12 App. Cas. 589; 56 L. J. 102; 57 L. T. 426; 36 W. R. 647	Reversed.
Beaudet, The North Shore Ry. Co. v.	15 S. C. R. 44	10 Gaz. 463	Leave to appeal refused.
Beckett, The Grand Trunk Ry. Co. v.	16 S. C. R. 713	9 Gaz. 394	Leave to appeal refused.
Bellean, The Queen v.	7 S. C. R. 537	App. Cas. 473	Reversed.
Bickford v. The Corporation of Chatham	16 S. C. R. 235	14 Gaz. 153	Leave to appeal refused.
British Columbia Towing Co., Sewell v.	9 S. C. R. 627		Leave granted, but appeal settled before argument on the merits.
Bury, Forsyth v.	15 S. C. R. 543	11 G. 418	Leave refused.
Caldwell v. McLaren	8 S. C. R. 435	9 App. Cas. 392; 53 L. J. 33; 51 L. T. 370	Reversed.

APPENDIX A—Continued.

REPORT IN SUP. CT.	REPORT IN PRIV. C.	RESULT.
Canada Atlantic Ry. Co. v. Ottawa " v. Cambridge	12 S. C. R. 365; 11 Can. Gaz. 394 15 S. C. R. 219; 11 Can. Gaz. 394 }	Leave granted, but appeals not argued on the merits.
Canada Central Ry. Co. v. Murray	8 S. C. R. 313; 8 App. Cas. 574	Leave to appeal refused.
Canadian Pacific Ry. Co., Robinson v.	19 S. C. R. 292; [1892] A. C. 481; 61 L. J. 791; 67 L. T. 506	Reversed.
Carson, Martley v.	20 S. C. R. 634	Leave granted, but appeal dismissed without hearing merits.
Central Vermont Ry. Co. v. The Town of St. Johns	14 S. C. R. 288; 14 App. Cas. 590; 59 L. J. 15; 61 L. T. 441	Affirmed.
Chevrier v. The Queen	4 S. C. R. 1	Leave to appeal refused.
Citizens Ins. Co., Parsons v.	4 S. C. R. 215; 7 App. Cas. 96; 51 L. J. 11; 45 L. T. 721	Affirmed on constitutional question, reversed on the merits.
Connecticut Mutual Ins. Co., Moore v.	6 S. C. R. 634; 6 App. Cas. 644	Affirmed.
Creelman, Kearney v.	14 S. C. R. 33	Leave to appeal refused.
Doutre v. The Queen	6 S. C. R. 432; 9 App. Cas. 745; 53 L. J. 85; 51 L. T. 659	Affirmed.
Duggan v. The London & Can. Loan & Agency Co.	20 S. C. R. 481	Leave granted—Not yet decided.
Dumoulin v. Langtry	13 S. C. R. 284; 57 L. T. 317	Leave to appeal refused.
Dupuy v. Duconou	6 S. C. R. 425; 9 App. Cas. 150; 53 L. J. 12; 50 L. T. 129	Reversed.
Exchange Bank of Canada v. La Banque du Peuple	8 S. C. Dig. 79; Gas. 394	Leave to appeal refused.
Forsyth v. Bury	15 S. C. R. 543; 11 G. 418	Leave to appeal refused.
Frederickton, the city of v. The Queen	3 S. C. R. 565; 7 App. Cas. 829	Affirmed.
Gagnon, Prince v.	7 S. C. R. 386; 8 App. Cas. 103	Leave to appeal refused.
Glengarry Election Case (Purcell v. Kennedy)	14 S. C. R. 453; 59 L. J. 279; 4 Times L. R. 664	Leave to appeal refused.
Goldie, Smith v.	9 S. C. R. 46	Leave to appeal refused.
Grand Trunk Ry. Co. v. Beckett	16 S. C. R. 713; 9 G. 394	Leave to appeal refused.
" v. McMillan	16 S. C. R. 543	Leave to appeal refused.
Great Western Ins. Co. v. Jordan	14 S. C. R. 734; 8 Gas. 404	Leave to appeal refused.
Gregory, The Atty. Gen. of Nova Scotia v.	S. C. Dig. 727; 11 App. Cas. 229; 55 L. J. 40; 55 L. T. 270	Leave granted—Settled before argument.

APPENDIX A—Continued.

	REPORT IN SUP. CT.	REPORT IN PRIV. C.	RESULT.
Hoggan v. Esquimaux and Nanaimo Ry. Co.	20 S. C. R. 235		Leave granted—Not yet decided.
Hurtéau, Ross v.	18 S. C. R. 713		Leave to appeal refused.
Johnson v. The Trustees of St. Andrew's church	1 S. C. R. 235	3 App. Cas. 159; 37 L. T. 557; 26 W. R. 359	Leave to appeal refused.
Jordan, The Great Western Ins. Co. v.	14 S. C. R. 734	8 Gaz. 464	Leave to appeal refused.
Kearney v. Orealman	14 S. C. R. 338	8 Gaz. 154	Leave granted—Settled before argument.
Lamoureux, Molleur v.	S. C. Dig. 717	8 Gaz. 154	Leave to appeal refused.
Langlois, Vallin v.	8 S. C. R. 15	5 App. Cas. 115; 49 L. J. 37; 41 L. T. 662	Leave to appeal refused.
Langtry, Dumoulin v.	13 S. C. R. 258	57 L. T. 317	Leave to appeal refused.
Lawless v. Sullivan	3 S. C. R. 117	6 App. Cas. 373; 50 L. J. 33; 44 L. T. 897; 29 W. R. 917	Leave to appeal refused.
Leacock, Shields v.	S. C. Dig. 604		Reversed.
LeFrançois, Russell v.	8 S. C. R. 335		Leave granted, but appeal settled before argument on merits.
Les Ecclesiastiques de St. Sulpice, The City of Montreal v.	16 S. C. R. 399	14 App. Cas. 660; 59 L. J. 20; 61 L. T. 653	Leave to appeal refused.
Letti, The St. Lawrence & Ottawa Ry. Co. v.	11 S. C. R. 422	6 Gaz. 583	Leave to appeal refused.
Lewin v. Wilson	9 S. C. R. 637	11 App. Cas. 639; 55 L. J. 75; 55 L. T. 410; 2 Times L. R. 741	Reversed.
Liquor License Act, 1883, <i>In re</i>	S. C. Dig. 509	6 Can. Gaz. 152, 265	Affirmed in part.
London and Canadian L. & A. Co., Duggan v.	20 S. C. R. 481		Leave granted—Not yet decided.
Manning, Nasmit v.	5 S. C. R. 417		Leave granted—Settled before argument.
Maritime Bank v. The Queen	17 S. C. R. 657	15 Gaz. 394	Leave to appeal refused.
" v. The Receiver General of New Brunswick	20 S. C. R. 235	[1892] A. C. 457; 61 L. J. 75; 67 L. T. 126	Affirmed.
Martley v. Carson	20 S. C. R. 634	14 Gaz. 270	Leave granted—Dismissed without being heard on merits on preliminary objection.
Mercer, The Atty. Gen. of Ontario v.	5 S. C. R. 538	8 App. Cas. 767; 52 L. J. 84; 49 L. T. 312	Reversed.
Moffatt v. The Merchants' Bank of Canada	11 S. C. R. 466	8 Gaz. 153	Leave to appeal refused.
Molleur v. Lamoureux	S. C. Dig. 717	8 Gaz. 154	Leave to appeal refused.

APPENDIX A—Continued.

	REPORT IN SUP. CT.	REPORT IN PRIV. C.	RESULT.
Montreal, The city of, v. Les Ecclesiastiques de St. Sulpice	16 S. C. R. 309	14 App. Cas. 660; 59 L. J. 20; 61 L. T. 653	Leave to appeal refused. Leave to appeal refused. Affirmed.
Montreal Passenger Ry. Co., Parker v.	S. C. Dig. 731		
Moore v. The Connecticut Mutual Ins. Co.	6 S. C. R. 634	6 App. Cas. 644	Leave to appeal refused.
Murray, The Canada Central Ry. Co. v.	8 S. C. R. 313	8 App. Cas. 574	Leave to appeal refused.
McLaren, Caldwell v.	8 S. C. R. 435	9 App. Cas. 392; 53 L. J. 33; 51 L. T. 370	Reversed.
McCord, Wadsworth v.	12 S. C. R. 446	14 App. Cas. 631; 59 L. J. 7; 61 L. T. 497	Affirmed.
McMillan, The Grand Trunk Ry. Co. v.	16 S. C. R. 543		Leave to appeal refused.
McQueen v. The Queen	16 S. C. R. 417	11 Gaz. 368	Leave to appeal refused.
Namith v. Manning	15 S. C. R. 41	10 Gaz. 463	Leave granted—Settled before argument.
North Shore Ry. Co. v. Beaudet	14 S. C. R. 674	14 App. Cas. 612; 59 L. J. 25; 61 L. T. 525	Leave to appeal refused.
" " Pion v.			Affirmed.
North West Transportation Co. v. Beatty	12 S. C. R. 598	12 App. Cas. 589; 56 L. J. 102; 57 L. T. 426; 36 W. R. 647	Reversed.
Ottawa, The Canada Atlantic Ry. Co. v.	12 S. C. R. 365	11 Can. Ga. 394	Leave granted—Settled before argument.
Parkdale, The Corporation of, v. West	12 S. C. R. 350	12 App. Cas. 602; 56 L. J. 66; 57 L. T. 602	Affirmed.
Parker v. The Montreal Passenger Ry. Co.	S. C. Dig. 731	6 Gaz. 174	Leave to appeal refused.
Parsons v. The Citizens' Ins. Co.	4 S. C. R. 215	7 App. Cas. 96; 51 L. J. 11; 45 L. T. 721	Affirmed on constitutional question—Re- versed on merits.
" v. The Queen Ins. Co.	4 S. C. R. 215	7 App. Cas. 96; 51 L. J. 11; 45 L. T. 721	
Pion v. The North Shore Ry. Co.	14 S. C. R. 674	14 App. Cas. 612; 59 L. J. 25; 61 L. T. 525	Affirmed.
Pontiac v. Ross	17 S. C. R. 406		Leave to appeal refused.
Prince v. Gagnon	7 S. C. R. 386	8 App. Cas. 103	Leave to appeal refused.
Quebec, The City of, v. The Quebec Central Ry. Co.	10 S. C. R. 563		Leave granted, but appeal settled before argument.
Queen, The, Arpin v.	14 S. C. R. 746	10 Gaz. 275	Leave to appeal refused.

APPENDIX A—Continued.

	REPORT IN SUP. CT.	REPORT IN PRIV. C.	RESULT.
Queen v. Bellean	7 S. C. R. 537	App. Cas. 473	Reversed.
" Chevrier v.	4 S. C. R. 1		Leave to appeal refused.
" The City of Fredericton v.	3 S. C. R. 505	7 App. Cas. 829	Affirmed.
" Doure v.	6 S. C. R. 482	9 App. Cas. 745; 53 L. J. 85; 51 L. T. 689	Affirmed.
" The Maritime Bank v.	17 S. C. R. 637	15 Gaz. 394	Leave to appeal refused.
" McQueen v.	16 S. C. R. 1		Leave to appeal refused.
" St. Catharine's Milling Co. v.	13 S. C. R. 577	14 App. Cas. 46; 53 L. J. 54; 53 L. T. 197; 5 Times L. R. 125	Affirmed.
" The Windsor & Annapolis Ry. Co. v.	10 S. C. R. 335	53 L. J. 41; 55 L. T. 271; 2 Times L. R. 743	Reversed in part.
Queen Ins. Co., Parsons v.	4 S. C. R. 215	7 App. Cas. 96; 51 L. J. 11; 45 L. T. 721	Affirmed on constitutional question — Reversed on merits.
Receiver General of New Brunswick, The Maritime Bank v.	20 S. C. R. 295	[1892] A. C. 437; 61 L. J. 75; 67 L. T. 126	Affirmed.
Reed, The Atty. Gen. of Quebec v.	8 S. C. R. 408	10 App. Cas. 141; 54 L. J. 13; 52 L. T. 395; 33 W. R. 618.	Affirmed.
Robinson v. The Canadian Pacific Ry. Co.	19 S. C. R. 232	[1892] A. C. 481; 61 L. J. 79; 67 L. T. 605	Reversed.
Ross v. Hurteau	18 S. C. R. 713		Leave to appeal refused.
Ross, Pontiac v.	17 S. C. R. 407		Leave to appeal refused.
Russell v. Lefrançois	8 S. C. R. 335		Leave to appeal refused.
Sewell v. The British Columbia Towing Co.	9 S. C. R. 537		Leave granted but appeal settled before argument on the merits.
Shields v. Leacock	S. C. Dig. 604		Leave granted, but appeal settled before argument on the merits.
Smith v. Goldie	9 S. C. R. 46		Leave to appeal refused.
St. Catharine's Milling Co. v. The Queen	13 S. C. R. 577	14 App. Cas. 46; 53 L. J. 54; 53 L. T. 197; 5 Times L. R. 125	Affirmed.
St. Johns, The Town of, The Central Vermont Ry. Co. v.	14 S. C. R. 288	14 App. Cas. 590; 59 L. J. 15; 61 L. T. 441	Affirmed.

APPENDIX A—Continued.

	REPORT IN SUP. CT.	REPORT IN PRIV. C.	RESULT.
St. Lawrence & Ottawa Railway Co. v. Lett Sullivan, Lawless v.	11 S. C. R. 422 6 Gaz. 583 3 S. C. R. 117 6 App. Cas. 373; 50 L. J. 33; 44 L. T. 897; 29 W. R. 917		Leave to appeal refused. Reversed.
Sweeny, The Bank of Montreal v.	12 S. C. R. 661 12 App. Cas. 617; 56 L. J. 79; 56 L. T. 897		Affirmed.
Trustees of St. Andrew's Church, Johnson v.	1 S. C. R. 236 8 App. Cas. 169; 37 L. T. 537; 26 W. R. 359		Leave to appeal refused.
Valin v. Langlois	3 S. C. R. 15 App. Cas. 115; 49 L. J. 37; 41 L. T. 662		Leave to appeal refused. Leave to appeal refused.
Vye, Alexander, v.	16 S. C. R. 501		
Wadsworth v. McCord	12 S. C. R. 446 14 App. Cas. 631; 59 L. J. 7; 61 L. T. 487		Affirmed.
West, The Corporation of Parkdale v.	12 S. C. R. 350 12 App. Cas. 602; 56 L. J. 66; 57 L. T. 602		Affirmed.
Wilson, Lewin, v.	9 S. C. R. 637 11 App. Cas. 639; 55 L. J. 75; 55 L. T. 410; 2 Times L. R. 741		Reversed.
Windsor and Annapolis Ry. Co. v. The Queen	10 S. C. R. 335 55 L. J. 41; 55 L. T. 271; 2 Times L. R. 743		Reversed in part.
Winnipeg, The City of, Barrett v.	19 S. C. R. 374 [1892] A. C. 445; 61 L. J. 58; 67 L. T. 429		Reversed.

APPENDIX B.

ARTICLES OF THE CODES DISCUSSED AND REFERRED TO.

Code, Civil, of Lower Canada.

See Action 7, Art. 2262.

“ 8, Arts. 1056, 2188, 2261, 2262, 2267.

Agreement 7, Arts. 1966, 1969, 1970.

Banks and Banking 4, Art. 1143.

“ 18, Arts. 1081, 1981.

“ 25, Arts. 14, 1970, 1973, 1975.

Builder's Privilege, Arts. 1695, 2013, 2103.

Community, Arts. 1760, 1265, 774.

Contract 1, Arts. 1067, 1073, 1544.

“ 26, Arts. 2260, 2261, 914.

“ 48, Art. 2262.

Crown 27, Arts. 2188, 2211, 2262, 2267.

“ 28, Art. 992.

Damages 40, Arts. 1065, 1073, 1077, 1840, 1841.

“ 45, Art. 1056.

“ 47, Art. 1056.

“ 49, Art. 1054.

“ 57, Arts. 1053, 1054, 1727.

Deed 3, Art. 970.

Domicile 2, Arts. 6, 63, 65, 79, 80, 81, 83, 1260.

Donation, Arts. 803, 1034.

“ 2, Arts. 806, 1592.

Evidence 53, Arts 14, 1234.

Execution 3, Arts. 595, 599.

Executors 10, Arts. 282, 285, 917.

“ 11, Art. 1711.

Fraudulent Preference 6, Art. 1953.

“ 9, Arts. 1039, 1040, 1082.

Husband and Wife 5, Art. 1301.

Hypothèque 4, Art. 2075.

Insolvency 1, Arts. 993, 1033, 1035, 1040, 1981, 1982.

“ 27, Arts. 1970, 1981.

“ 30, Art. 2023.

“ 30, 32, Arts. 1975, 1034, 1035, 1169.

Insurance Fire 8, Art. 2482.

“ Life 10, Art. 153.

“ “ 16, Arts. 2437, 2438, 2535.

“ Marine 19, Arts. 2538, 2541, 2544.

“ “ 24, Art. 2184.

Code, Civil, of Lower Canada—Continued.

- See* Judgment 11, Art. 1241.
 Judicial Avowal, Art. 1248.
 Jurisdiction 85, Art. 1624.
 Land, Arts. 2188, 2261, 2267.
 Landlord and Tenant 4, Arts. 1054, 1627, 1629.
 " " 6, Arts. 1058, 1627, 1629.
 Lease 18, Arts. 1612, 1614, 1618.
 Litigious Rights, Arts. 1582, 1583, 1584.
 Malicious Prosecution, Arts. 2262, 2267.
 Negligence 81, Arts. 17, (ss. 24, 1053, 1055, 1071
 Opposition, Arts. 1379, 2191.
 Partnership 13, Art. 1867.
 Petition of Right 3, Arts. 2211, 2251, 2206.
 Pledge 2, Art. 1970.
 " 5, Arts. 419, 1977, 2015, 2094.
 Practice 14, Arts. 485, 989, 990, 1583, 2187, 2216, 2243, 2265.
 Prescription 1, Art. 2250.
 " 19, Art. 2262.
 " 20, Arts. 1056, 2188, 2261, 2262, 2267.
 Pro-tutor, Art. 290 et seq.
 Railways 55, Arts. 1973, 1996, 1998, 2009, 2017.
 Railways and Railway Companies 69, Arts. 1053, 1676.
 Riparian Proprietors 4, Arts. 503, 549, 2193.
 Sale of Goods 6, Art. 1285.
 " " 22, Arts. 1063, 1064, 1235, 1474, 1710, 1802.
 " Lands 2, Arts. 1022, 1067, 1536, 1537, 1538, 1550, 1478.
 " " 83, Arts. 1501, 1502.
 Servitude, Arts. 557, 558.
 Sheriff 10, Art. 2091.
 Subrogation, Art. 1155, s. 2.
 Succession 1, Arts. 646, 650.
 Transaction, Arts. 1918, 1920.
 Trusts and Trustees 9, Arts. 1755, 2268.
 " " 18, Arts. 297, 298, 299.
 " " 20, Arts. 931, 938, 939, 1047, 1048.
 Tutor and Minor 1, Arts. 2243, 2253.
 " " 2, Arts. 269, 945.
 " " 3, Arts. 297, 298.
 Vendor and Purchaser 2, Arts. 1510, 1517, 1518.
 Will 8, Art. 889.
 " 9, Art. 972.
 " 10, Art. 2268.
 " 21, Art. 1484.

Code, Municipal, Lower Canada.

- Assessment and Taxes 12, Art. 713
 " " 13, Art. 712.
 Corporations 33, Art. 982.

Code, Municipal, Lower Canada—Continued.

See Corporations 87, Arts. 100, 461, 705.

Prohibition 1, Arts. 716, 746.

Code of Procedure, Lower Canada.

See Action 8, Arts. 431, 433.

Arbitration and Award 15, Art. 222.

" 24 Art. 1946.

Assignment 6, Arts. 13, 19.

Builder's Privilege Arts. 383 *et seq.*

Capias, Art. 798.

Contract 10, Arts. 345, 346.

" 12, Arts. 228, 229.

" 17, Arts. 228, 229.

Corporations 48, Arts. 997 *et seq.*

Damages 80, Art. 120.

Divorce, Art. 14.

Elections 28, Art. 57.

Fraudulent Preference 6, Arts. 798, 819, 821, 1056, 1953.

Jurisdiction 85, Art. 1120.

" 71, Art. 1110.

" 88, Arts. 856, 887.

" 104, Art. 439.

" 106, Arts. 1178, 1178a.

Lease, Art. 19.

Notice 8, Gen. Provs., 1st pt. s. 22.

Opposition, Art. 682.

" 2, Arts. 483, 484, 505.

Petition of Right 3, Arts. 416, 473.

Practice 3, Art. 476.

" 10, Art. 451.

" 14, Arts. 154, 510.

" 34, Arts. 887, 888.

Prohibition 5, Arts. 1023, 1031.

Sheriff, Arts. 581, 638.

" 7, Arts. 688, 691, 694, 760.

" 10, Art. 632.

Solicitor and Client 4, Art. 753.

Substitution 3, Art. 154.

Trusts and Trustees 15, Art. 19.

Will 21, Art. 920.

" 26, Art. 711.

APPENDIX C.

CASES APPROVED, DISTINGUISHED, FOLLOWED, OVERRULED, OR REFERRED TO.

- Aetna Insurance Co. v. Brodie**, 5 Can. S. C. R. 1. Followed.
See EVIDENCE, 58.
 PRACTICE, 21.
- Allan v. Pratt**, 18 App. Cas. 780. Referred to.
See JURISDICTION, 56.
- Alport, Howell v.**, 12 U. C. C. P. 375. Overruled.
See STOPPAGE IN TRANSITU.
- Anderson, Fisher v.** 4 Can. S. C. R. 406. Followed.
See WILL, 20.
- Attorney-General v. Contois**, 25 Grant, 346. Referred to.
See PETITION OF RIGHT, 18.
- Ball v. McCaffrey**, 20 Can. S. C. R. 317. Approved and followed.
See REVENDICATION, 3.
- Ballagh v. The Royal Mutual Fire Insurance Co.**, 5 Ont. App. R. 87.
 Approved.
See INSURANCE, FIRE, 5.
- Bank of Montreal, Sweeny v.**, 12 App. Cas. 617. Followed.
See TRUSTS AND TRUSTEES, 14, 18, 23.
- Bank of Toronto, Lamb v.**, 12 App. Cas. 575. Distinguished.
See LEGISLATURE, 18.
- Bank of Nova Scotia, Queen v.**, 11 Can. S. C. R. 1. Followed.
See CROWN, 21, 31.
- Banque Jacques Cartier v. La Banque d'Epargne**, 18 App. Cas. 118.
 Followed.
See FORGERY, 3.
- Banque d'Epargne, Banque Jacques Cartier, v.**, 18 App. Cas. 118. Followed.
See FORGERY, 3.
- Bank of Montreal, Sweeny v.**, 12 Can. S. C. R. 661, 12 App. Cas. 617.
 Referred to and followed.
See TRUSTS AND TRUSTEES, 14, 18, 23.
- Barton v. London & North West Ry. Co.**, 6 L. T. Rep 70. Followed.
See FORGERY, 3.
- Bernardin v. North Dufferin**, 19 Can. S. C. R. 581. Distinguished.
See MUNICIPAL CORPORATION, 28.
- Berthier Election Case**, 9 Can. S. C. R. 102. Followed.
See ELECTIONS, 44.

Appendix C.—Continued.

- Boale v. Dickson**, 18 U. C. C. P. 337. Approved.
See STREAMS.
- Blakie, Grindley, v.** 19 N. S. R. 27. Approved and followed.
See REGISTRATION, 8.
- Bouchard, Couture, v.** 21 Can. S. C. R. 231. Followed.
See JURISDICTION, 111.
- Black, Wheeler, v.** 14 Can. S. C. R. 242. Referred to.
See JURISDICTION, 87.
- Brisebold v. The Queen**, 15 Can. S. C. R. 421. Referred to.
See CRIMINAL APPEAL, 13.
- Bristol & Exeter Ry. Co. v. Collins**, 7 H. L. Cases 194. Followed.
See RAILWAYS AND RAILWAY COMPANIES, 43.
- Brodie, Aetna Insurance Co. v.** 5 Can. S. C. R. 1. Followed.
See EVIDENCE, 53.
PRACTICE, 21.
- Brown v. Pinsonneault**, 3 Can. S. C. R. 102. Overruled.
See ASSIGNMENT, 6.
- Brown v. Pinsonneault**, 3 Can. S. C. R. 102. Distinguished.
See TRUSTS AND TRUSTEES, 15.
- Brown v. The Toronto & Nipissing Ry. Co.**, 26 U. C. C. P. 206. Overruled.
See RAILWAYS AND RAILWAY COMPANIES, 29.
- Burland v. Moffatt**, 11 Can. S. C. R. 76. Distinguished.
See TRUSTS AND TRUSTEES, 15.
- Burland v. Moffatt**, 11 Can. S. C. R. 76. Overruled.
See ASSIGNMENT, 6.
- Carson, Kielley, v.** 4 Moo. P. C. C. 63. Commented on and followed.
See LEGISLATURE, 9.
- Cogswell, O'Brien, v.** 17 Can. S. C. R. 420. Followed.
See ASSESSMENT AND TAXES, 24.
- Collins, Bristol & Exeter Ry. Co. v.** 7 H. L. Cas. 194. Followed.
See RAILWAYS AND RAILWAY COMPANIES, 43.
- Commercial Bank v. Willson**, 3 E. & A. Rep. 257. Discussed.
See CHATTEL MORTGAGE, 18.
- Confederation Life Ass. v. O'Donnell**, 10 Can. S. C. R. 92; 13 Can. S. C. R. 218. Adhered to.
See INSURANCE, LIFE, 7.
- Contois, Attorney-General v.** 25 Gr. 346. Referred to.
See PETITION OF RIGHT, 18.
- Corbett, Providence Washington Ins. Co.** 9 Can. S. C. R. 256. Approved.
See INSURANCE, MARINE, 16.
- Corporation of Quebec v. Leaycraft**, 7 Q. L. R. 56. Distinguished.
See ASSESSMENT AND TAXES, 12.

Appendix C.—Continued.

Corporation of Yarmouth v. Simmons, L. R. 10 Ch. D. 518. Followed.
See ACCRETION, 1.

County of Yverchères v. Village of Yverennes, 19 Can. S. C. R. 365. Followed.
See JURISDICTION, 98, 98.

Couture v. Bouchard, 21 Can. S. C. R. 381. Followed.
See JURISDICTION, 111.

Cushing v. Dupuy, 5 App. Cas. 409. Followed.
See JURISDICTION, 82.

Crysler, McKay, v., 3 Can. S. C. R. 486. Followed.
See ASSESSMENT AND TAXES, 24.

Dawson, McDonald, v., 11 Q. L. R. 181. Followed.
See PRESCRIPTION, 22.

Desilets, Gingras v., Dig. "Damages" 23. Followed.
See APPEAL, 58.

DAMAGES, 57.
 JURISDICTION, 75.

Desbarres, Doe D. v. White, 1 Kerr, N. B. 595. Approved.
See LIMITATIONS, 9.

Desmarteau, Hurtubise, 19 Can. S. C. R. 562. Followed.
See JURISDICTION, 106.

Dickson, Boale v., 18 U. C. C. P. 387. Approved.
See STREAMS.

Doyle v. Falconer, L. R. 1 P. C. 328. Commented on and followed.
See LEGISLATURE, 9.

Dupuy, Cushing v., 5 App. Cas. 409. Followed.
See JURISDICTION, 82.

Eureka Woollen Mills Co. v. Moss, 11 Can. S. C. R. 91. Distinguished.
See JURISDICTION, 68.

Falconer, Doyle v., L. R. 1 P. C. 328. Commented on and followed.
See LEGISLATURE, 9.

Fauteux, Montreal Loan & Mortgage Co., 3 Can. S. C. R. 411. Followed.
See PRACTICE, 10.

Fisher v. Anderson, 4 Can. S. C. R. 406. Followed.
See WILL, 20.

Faderman, R. v., D. C. C. 572. Approved.
See CRIMINAL APPEAL, 6.

Gilbert v. Gilman, 16 Can. S. C. R. 189. Approved.
See JURISDICTION, 87.

Gilbert v. Gilman, 16 Can. S. C. R. 189. Followed.
See JURISDICTION, 92.

Gillespie, Merchants' Bank of Halifax v., 10 Can. S. C. R. 312. Distinguished.

See WINDING-UP, 9.

Appendix C.—Continued.

- Gilman, Gilbert v.**, 16 Can. S. C. R. Approved.
See JURISDICTION, 87.
- Gilman, Gilbert v.**, 16 Can. S. C. R. 189. Followed.
See JURISDICTION, 92.
- Gilmour, Whishaw v.**, 15 L. C. R. 177. Approved.
See PRESCRIPTION, 1.
- Gingras v. Desilets**, Dig. "Damages," 28. Followed.
See APPEAL, 53.
 DAMAGES, 57.
 JURISDICTION, 75.
- Graham v. Smith**, 27 U. C. C. P. 1. Overruled.
See STOPPAGE IN TRANSITU, 1.
- Grand Trunk Ry. Co. v. Rosenberger**, 9 Can. S. C. R. 811. Followed.
See RAILWAYS AND RAILWAY COMPANIES, 66.
- Grand Trunk Ry. Co., Vogel v.**, 11 Can. S. C. R. 612. Distinguished.
See RAILWAYS AND RAILWAY COMPANIES, 48.
- Grindley v. Blaikie**, 19 N. S. Reports 27. Approved and followed.
See REGISTRATION, 8.
- Halter, Molson's Bank v.**, 18 Can. S. C. R. 88. Followed.
See ASSIGNMENT, 21, 24.
- Hannon, McLean, v.**, 3 Can. S. C. R. 706. Followed.
See SHERIFF, 12.
- Hart, Joyce v.**, 1 Can. S. C. R. 321. Overruled.
See JURISDICTION, 56.
- Hodge v. The Queen**, 9 App. Cas. 117. Followed.
See LEGISLATURE, 18.
- Hovey v. Whiting**, 14 Can. S. C. R. 515. Followed.
See CHATTEL MORTGAGE, 12.
- Howell v. Alport**, 12 U. C. C. P. 875. Overruled.
See STOPPAGE IN TRANSITU, 1.
- Hurtubise v. Desmarteau**, 19 Can. S. C. R. 562. Followed.
See JURISDICTION, 106.
- Jones v. The Queen**, 7 Can. S. C. R. 570. Followed.
See CONTRACT, 88.
- Joyce v. Hart**, 1 Can. S. C. R. 321. Overruled.
See JURISDICTION, 56.
- Keilley v. Carson**, 4 Moo. P. CC. 63. Commented on and followed.
See LEGISLATURE, 9.
- King's Co. (N. S.) Election Case**, 19 Can. S. C. R. 526. Followed.
See ELECTION, 12.
- Lacombe, Queen v.**, 18 L. C. Jur. 259. Overruled.
See CRIMINAL APPEAL, 13.
- Langlois, Yalin v.**, 3 Can. S. C. R. 1; 5 App. Cas. 115. Followed.
See PARLIAMENT OF CANADA, 8.

Appendix C.—Continued.

- Lamb v. Bank of Toronto**, 12 App. Cases, 575. Distinguished.
See LEGISLATURE, 18.
- Leaycraft, Corporation of Quebec v.**, 7 Q. L. R. 56. Distinguished.
See ASSESSMENT AND TAXES, 12.
- Leclaire, McFarlane v.**, 15 Moo. P. C. C. 181. Referred to.
See JURISDICTION, 86.
- Levi v. Reed**, 6 Can. S. C. R. 482. Followed.
See APPEAL, 58.
JURISDICTION, 75.
- Levi v. Reed**, 6 Can. S. C. R. 482. Approved.
See DAMAGES, 23, 57.
- Levi v. Reed**, 6 Can. S. C. R. 482. Overruled.
See JURISDICTION, 56.
- Lionais v. Molson's Bank**, 10 Can. S. C. R. 526. Followed.
See PRACTICE, 10.
- London & North-West Ry. Co., Barton v.**, 6 L. T. Rep. 70. Followed.
See FORGERY, 3.
- Maguire v. Scott**, 7 L. C. R. 451. Distinguished.
See PARTNERSHIP, 18.
- McArthur, Stephens v.** 19 Can. S. C. R. 446. Followed.
See ASSIGNMENT, 24.
- McCall v. Wolfe**, 13 Can. S. C. R. 130. Distinguished.
See CHATTEL MORTGAGE, 12.
- McCall v. Wolfe**, 13 Can. S. C. R. 130. Approved and distinguished.
See CORPORATIONS, 30.
- McCaffrey, Ball v.** 20 Can. S. C. R. 317. Approved and followed.
See REVENDICATION, 3.
- McCaffrey, Ball, v.** 20 Can. S. C. R. 317. Approved and followed.
See REVENDICATION, 3.
- McDonald v. Dawson**, 11 Q. L. R. 181. Followed.
See PRESCRIPTION, 22.
- McFarlane v. Leclaire**, 15 Moo. P. CC. 181. Referred to.
See JURISDICTION, 86.
- McGreovy v. The Queen**, 14 Can. S. C. R. 785. Followed.
See APPEAL, 20.
- McKay v. Chrysler**, 3 Can. S. C. R. 436. Followed.
See ASSESSMENT AND TAXES, 24.
- McLean v. Hannon**, 3 Can. S. C. R. 706. Followed.
See SHERIFF, 12.
- McManamy, Sherbrooke v.** 18 Can. S. C. R. 594. Followed.
See JURISDICTION, 93.
- Megantic Election Case**, 8 Can. S. C. R. 169. Discussed.
See ELECTION, 36.

Appendix C.—Continued.

Merchants Bank of Halifax v. Gillespie, 10 Can. S. C. R. 812. Distinguished.

See WINDING-UP, 9.

Moffatt, Burland v. 11 Can. S. C. R. 76. Distinguished.

See TRUSTS AND TRUSTEES, 15.

Moffatt, Burland v. 11 Can. S. C. R. 76. Overruled.

See ASSIGNMENT, 6.

Molson's Bank v. Halter, 18 Can. S. C. R. 88. Approved and followed.

See ASSIGNMENT, 21, 24.

Molson's Bank, Lionais v. 10 Can. S. C. R. 526. Followed.

See PRACTICE, 10.

Monk Election Case, Hodgins Election Cases 725. Approved.

See ELECTION, 12.

Moreau v. Motz, 7 L. C. R. 147. Followed.

See TUTOR AND MINOR, 1.

Morin, Patton v., 16 L. C. R. 267. Followed.

See WILL, 26.

Montreal Loan & Mortgage Co. v. Fauteux, 3 Can. S. C. R. 411. Followed.

See PRACTICE, 10.

Moss, Eureka Woollen Mills Co. v. 11 Can. S. C. R. 91. Distinguished.

See JURISDICTION, 63.

Motz, Moreau v., 7 L. C. R. 147. Followed.

See TUTOR AND MINOR, 1.

North Dufferin, Bernardin v. 19 Can. S. C. R. 581. Distinguished.

See MUNICIPAL CORPORATION, 28.

North Shore Ry. Co., Plon v. 14 App. Cas. 612. Followed.

See EXPROPRIATION, 10.

O'Brien, In re, 16 Can. S. C. R. 197. Referred to.

See CONTEMPT, 4.

JURISDICTION, 107.

O'Brien v. Cogswell, 17 Can. S. C. R. 420. Followed.

See ASSESSMENT AND TAXES, 24.

O'Donnell, Confederation Life Ass. v., 10 Can. S. C. R. 92; 13 Can.

S. C. R. 218. Adhered to.

See INSURANCE LIFE, 7.

Ontario Bank v. Wilcox, 43 U. C. Q. B. 460. Distinguished.

See SALE OF GOODS, 16.

O'Shea v. O'Shea, 15 P. D. 59. Followed.

See JURISDICTION, 107.

Patton v. Morin, 16 L. C. R. 267. Followed.

See WILL, 26.

Pinsonneault, Brown v., 3 Can. S. C. R. 102. Overruled.

See ASSIGNMENT, 6.

Appendix C.—Continued.

- Pinsonneault, Brown v.**, 3 Can. S. C. R. 102. Distinguished.
See TRUSTS AND TRUSTEES, 15.
- Pion v. North Shore Railway Co.**, 14 App. Cas. 612. Followed.
See EXPROPRIATION, 10.
- Porteous v. Reynar**, 18 App. Cas. 120. Distinguished.
See TRUSTS AND TRUSTEES, 15.
- Pratt, Allan v.**, 18 App. Cas. 780. Referred to.
See JURISDICTION, 56.
- Providence Washington Insurance Co. v. Corbett**, 9 Can. S. C. R. 256.
 Approved:
See INSURANCE MARINE, 16.
- Provincial Ins. Co., Robertson v.**, 3 All. N. B. 379. Followed.
See INSURANCE MARINE, 11.
- Queen v. The Bank of Nova Scotia**, 11 Can. S. C. R. 1. Followed.
See CROWN, 21, 32.
- Queen, Brisebeis v.**, 15 Can. S. C. R. 421. Referred to.
See CRIMINAL APPEAL, 13.
- Queen, Hodge v.**, 9 App. Cas. 117. Followed.
See LEGISLATURE, 13.
- Queen, Jones v.**, 7 Can. S. C. R. 570. Followed.
See CONTRACT, 38.
- Queen, The, v. Lacombe**, 13 L. C. Jur. 259. Overruled.
See CRIMINAL APPEAL, 13.
- Queen, McGreevy v.**, 14 Can. S. C. R. 735. Followed.
See APPEAL, 20.
- Queen, Severn v.**, 2 Can. S. C. R. 70. Distinguished.
See LEGISLATURE, 13.
- Queen's County (P. E. I.) Election Case**, 20 Can. S. C. R. 26. Followed.
See ELECTION, 12.
- Queen, The, v. Taylor**, 36 U. C. Q. B. 218. Overruled.
See LEGISLATURE, 2.
- R. v. Faderman**, D. C. C. 572. Approved.
See CRIMINAL APPEAL, 6.
- Reburn v. St. Anne**, 15 Can. S. C. R. 92. Distinguished.
See JURISDICTION, 98.
- Reed, Levi v.**, 6 Can. S. C. R. 482. Approved.
See DAMAGES, 23, 57.
- Reed, Levi v.**, 6 Can. S. C. R. 482. Overruled.
See JURISDICTION, 56.
- Reed, Levi v.**, 6 Can. S. C. R. 482. Followed.
See JURISDICTION, 75.
 APPEAL, 53.
- Renaud, Ex parte**, 1 Pugs. (N.B.) 273. Distinguished.
See LEGISLATURE, 21.

Appendix C.—Continued.

- Robertson v. Provincial Insurance Co.**, 8 All. N. B. 879. Followed.
See INSURANCE MARINE, 11.
- Rosenberger, Grand Trunk Ry. Co. v.**, 9 Can. S. C. R. 311. Followed.
See RAILWAYS AND RAILWAY COMPANIES, 66.
- Ross v. Torrance**, 2 Legal News, 186. Overruled.
See TRUSTS AND TRUSTEES, 15.
- Reynar, Porteous v.**, 18 App. Cas. 120. Distinguished.
See LEGISLATURE, 20.
- Royal, Mutual Fire Ins. Co., Ballagh v.**, 5 Ont. App. R. 87. Approved.
See INSURANCE, FIRE, 5.
- Ryan v. Ryan**, 5 Can. S. C. R. 487. Followed.
See POSSESSION, 10.
- Rykert, St. John v.**, 10 Can. S. C. R. 278. Followed.
See INTEREST, 7.
- Scott, Macguire v.**, 7 L. C. R. 451. Distinguished.
See PARTNERSHIP, 13.
- Selkirk Election Case**, 4 Can. S. C. R. 494. Followed.
See ELECTION, 23.
- Severn v. The Queen**, 2 Can. S. C. R. 70. Distinguished.
See LEGISLATURE, 18.
- Shaw v. St. Louis**, 8 Can. S. C. R. 385. Followed.
See JURISDICTION, 104.
- Shaw v. St. Louis**, 8 Can. S. C. R. 385. Distinguished.
See JURISDICTION, 71.
- Sherbrooke v. McManamy**, 18 Can. S. C. R. 594. Followed.
See JURISDICTION, 93.
- Simmons, Corporation of Yarmouth v.**, L. R. 10. ch. D. 518. Followed.
See ACCRETION, 1.
- Smith, Graham v.**, 27 U. C. C. P. 1. Overruled.
See STOPPAGE IN TRANSITU, 1.
- Smith, Young v.**, Selkirk Election Case, 4 Can. S. C. R. 494. Followed.
See ELECTION, 23.
- Stanstead Election Case**, 20 Can. S. C. R. 12. Followed.
See ELECTION, 40.
- Stephens v. McArthur**, 19 Can. S. C. R. 446. Followed.
See ASSIGNMENT, 24.
- St. Anne, Reburn v.**, 15 Can. S. C. R. 92. Distinguished.
See JURISDICTION, 98.
- St. John v. Rykert**, 10 Can. S. C. R. 278. Followed.
See INTEREST, 7.
- St. Louis, Shaw v.**, 8 Can. S. C. R. 385. Followed.
See JURISDICTION, 104.
- St. Louis, Shaw v.**, 8 Can. S. C. R. 385. Distinguished.
See JURISDICTION, 71.

Appendix C.—Continued.

- Sweeney v. Bank of Montreal**, 12 Can. S. C. R. 661; 12 App. Cas. 617.
 Referred to and Followed.
See TRUSTS AND TRUSTEES, 14, 18, 23.
- Taylor, Queen v.**, 86 U. C. Q. B. 218. Over-ruled.
See LEGISLATURE, 2.
- Toronto & Nipissing Ry. Co., Brown v.**, 26 U. C. C. P. 206. Over-ruled.
See RAILWAYS AND RAILWAY COMPANIES, 29.
- Torrance, Ross v.**, 2 Legal News, 186. Over-ruled.
See LEGISLATURE, 20.
- Valin v. Langlois**, 8 Can. S. C. R. 1; 5 App. Cas. 115. Followed.
See PARLIAMENT OF CANADA, 8.
- Yarennas, Yereheres v.**, 19 Can. S. C. R. 365. Followed.
See JURISDICTION, 98, 98.
- Yereheres v. Yarennas**, 19 Can. S. C. R. 365. Followed.
See JURISDICTION, 98, 98.
- Village of Yarennas, County of Yereheres v.**, 19 Can. S. C. R. 365.
 Followed.
See JURISDICTION, 98.
- Vogel v. Grand Trunk Ry. Co.**, 11 Can. S. C. R. 612. Distinguished.
See RAILWAYS AND RAILWAY COMPANIES, 43.
- Wheeler v. Black**, 14 Can. S. C. R. 242. Referred to.
See JURISDICTION, 87.
- White, DesBarres, Doe d. v.**, 1 Kerr, N. B. 595. Approved.
See LIMITATIONS, 9.
- Whiting, Hovey v.**, 14 Can. S. C. R. 515. Followed.
See CHATTEL MORTGAGE, 12.
- Whishaw v. Gilmour**, 15 L. C. R. 177. Approved.
See PRESCRIPTION, 1.
- Wilcox, Ontario Bank v.**, 43 U. C. Q. B. 460. Distinguished.
See SALE OF GOODS, 16.
- Wilson, Commercial Bank v.**, 3 E. & A. Rep. 257. Discussed.
See CHATTEL MORTGAGE, 18.
- Wolf, McCall v.**, 13 Can. S. C. R. 130. Distinguished.
See CHATTEL MORTGAGE, 12.
- Wolf, McCall v.**, 13 Can. S. C. R. 130. Approved and distinguished.
See CORPORATION, 30.
- Young v. Smith (Selkirk Election Case)**, 4 Can. S. C. R. 494. Followed.
See ELECTION, 23.

TABLE OF CASES IN THE DIGEST.

Name of Case and where reported.	Page of Digest.
Abbott, Fraser v.,	695
Abbott v. Macdonald, iii. 278	414, 696
Abell v. Church, i. 442	761
Abrahams v. The Queen, vi. 10	192
Accident Ins. Co. of North America v. McLachlan, xviii. 627	448
v. Young, xx. 280	378
Adams, Crowe v., xxi. 342	804
Adamson v. Adamson, xii. 563	653, 686
Aetna Ins. Co. v. Atty-Gen'l of Ontario, xviii. 707	366
Aetna Life Ins. Co. v. Brodie, v. 1	369, 673, 678
Albert Mining Co., Spurr v., ix. 35	136
Alexander, Nordheimer v., xix. 248	563
Alexander v. Vye, xvi. 501	289
Allan, Brown v.,	146
Allen v. Hanson, xviii. 667	132, 591, 863
Allen v. The Merchant's Mar. Ins. Co. of Canada, xv. 488	393
Almon v. Lewin, v. 514	869
Almon, Providence Washington Ins. Co. v.,	390
Amer v. The Queen, ii. 592	413
Ames, Fuller v.,	140
Amyot v. Labreque (Bellechasse Election Case), xx. 181	273, 296
Anchor Marine Ins. Co. v. Corbett, ix. 73	380
Keith v., ix. 483	382
Anderson, Fawcett v.,	8
Fisher v., iv. 406	677, 868
v. Jellett, ix. 1	315
Lawrence v., xvii. 349	61
Anglo-Continental Guano Works, The Emerald Phosphate Co. v., xxi. 422 ..	457
Anglo-French S. S. Co., Guilford v., ix. 308	137
Angus v. Calgary School Trustees, xvi. 716	443
Annard, Tupper v., xvi. 718	601
Annapolis Election Case (Mills v. Ray), xx. 169	272
Annual Conference of New Brunswick, The, Ray v., vi. 308	870
Antigonish Election Case (Thompson v. McGillivray), xx. 169	272
Archer, Severn v.,	875
Archibald v. Hubley, xviii. 116	119, 300, 659
Archibald v. McLaren, xxi. 588	514
Argentenil Election Case (Christie v. Morrison), xx. 194	274, 665
Arnold, Byrne v.,	107
Arpin v. The Queen, xiv. 736	21

Name of Case and where reported.	Page of Digest.
Ashdown, Dedrick v., xv. 227	118
Ashdown v. The Manitoba Free Press Co., xx. 43	492, 578, 647, 664
Association Pharmaceutique de la Province de Quebec v. Brunet, xiv. 738 ..	600
Athabasca, The (C. P. R., v. Neelon—C. P. R. v. Helliwell,	522
Atlantic & North West Ry. Co., Benning v., xx. 177	44
Attorney-General of Nova Scotia v. Axford. xiii. 294	113
Attorney-General of British Columbia v. Attorney-General of Canada, xiv. 345.	528
Attorney-General of Canada v. The City of Montreal, xiii. 352	50, 674
Attorney-General of Canada v. The City of Toronto	57
Attorney-General of Canada, The Dominion Salvage & Wrecking Co. v., xxi. 72	187
Attorney-General of Canada v. Flint, xvi. 707	591
Attorney-General of Canada, Fonseca v., xvii. 612	488, 754
Attorney-General of Nova Scotia, The Warden, etc., of Lunenburg v., xx. 596	557
Attorney-General of Ontario, The Aetna Ins. Co. v., xviii. 707	366
Attorney-General of Ontario v. Attorney-General of Canada, xiv. 736.....	647
Attorney-General of Ontario, Mercer v., v. 538	477
Attorney-General of Ontario v. The Vaughan Road Co., xxi. 631	188
Attorney-General of Quebec, Reed v., viii. 408	478
Attrill v. Platt, x. 425	240
Aubert Gallion v. Roy, xxi. 456	887
Austin, Page v., x. 132	169
Axford, Attorney-General of Nova Scotia v., xiii. 294	113
Ayotte v. Boucher, ix. 460	413, 824
Ayr American Plow Co. v. Wallace, xxi. 256	89

B.

Badenach, Slater v., x. 296	58, 319
Baechler, Furdorn v., xv. 610	600
Bagot Election Case (Dupont v. Morin), xxi. 28	276
Bailey v. The Ocean Mutual Mar. Ins. Co. xix. 153	396
Bain, Cholette v. (Boulanges Election Case), x. 652.....	264
v. City of Montreal, viii. 252	46
Baird, Ellis v., xvi. 147	189, 438
Balfour, Williams v., xviii. 472	544
Ball v. The Crompton Corset Co. xiii. 469	612
v. McCaffrey, xx. 319	282, 453
O'Shaughnessy v., xxi. 415	755
Bank of British North America v. Walker	214, 425, 670, 671, 673, 697, 701, 706
Bank of Hamilton, Harvey v., xvi. 714	86
Banque Jacques Cartier, Giraldi v., ix. 597	67
Bank of Liverpool, <i>In re</i> (Forsythe v. Bank of N.S.), xviii. 707	883
Bank of Montreal v. Haffner.....	526
The Manitoba Mortgage Co. v., xvii. 692.....	602
Sweeney v., xii. 661	852
v. Worswick.....	526
Bank of New Brunswick, Scott v., xxi. 30.....	578

Table of Cases in the Digest.

907

Name of Case and where reported.	Page of Digest.
Bank of Nova Scotia, Forsythe v. (<i>In re</i> The Bank of Liverpool), xviii. 707....	888
Mott v., xiv. 650	882
The Queen v., xi. 1.....	199
Smith v., viii. 558	167
Bank of Prince Edward Island, Ings v., xi. 265	70
Bank of Toronto v. Les Curé et Marguilliers, etc., de la Nativité, etc., xii. 25 482, 687	
Perkins, viii. 608	67
Bannerman, Emerson v., xix. 1	120
Baptist v. Baptist, xxi. 425	457
Barbeau, Labelle v., xvi. 390	439
Barber, Gibbins v., xix. 204	484, 554
Barlow, Fairbanks v., xiv. 317	648
Barnard v. Molson, xv. 716	511
Barnard, Molson v., xviii. 622	447
Barned's Banking Co., Reynolds v.	170
Barnes v. The Exchange Bank of Canada, xiv. 716	75
Barrett v. The City of Winnipeg, xix. 374	484
Barrington v. The Scottish Union & National Ins. Co., xviii. 615	447
Barry, Ross v., xix. 360	295
Barsalou v. Darling, ix. 677	359
Barss, Merchants Marine Ins. Co. v., xv. 185	398
Barton. The Corporation of the Township of, the City of Hamilton v., xx. 178,	
555, 820	
Barton v. McMillan, xx. 404	813, 820
Bate v. The Canadian Pacific Ry. Co., xviii. 697.....	747
Baylis, Drummond v., ii. 61	92
Beamish v. Kaulbach, iii. 704.....	417, 677
Beatty v. Neelon, xiii. 1	181
North-west Transportation Co., xii. 598	180
O'Donohoe v., xix. 356.....	27, 449, 812
v. Oille, xii. 706.....	675
Beaubien v. Bernatchez	488
Beaudet v. The North Shore Ry. Co., xv. 44.....	40
Beaudry, Grant v.	581
Beaulieu, The Queen v., xvi. 716	41
Beausoleil v. Normand, ix. 711.....	18
Beckett, The Grand Trunk Ry. of Canada v., xvi. 713.....	742
Bedell, Owens v., xix. 137	823
Bell, Fraser v., xiii. 546	646
Houghton v.	880
v. Macklin, xv. 576.....	581, 791
Rickaby v., ii. 560	339
Bell Telephone Co. of Canada, The Electric Despatch Co. of Toronto v., xx. 83 161	
v. The City of Quebec, xx. 230	452
Belleau v. Dussault (Levis Election Case), xi. 133	265, 686
Belleau, The Queen v., vii. 53	625
Bellechasse Election Case (Amyot v. Labrecque), xx. 181	278, 296
(Larue v. Deslauriers), v. 91.....	255
Bellemare, Dansereau v., xvi. 180	612

Name of Case and where reported.	Page of Digest.
Bender, Carrier v.	674
v. Carrier, xv. 19	151
Benedict, Scott v., xiv. 785	790
Benning v. The Atlantic and North-West Ry. Co., xx. 177	44
v. Thibaudau, xx. 110	64, 348
Berger, Munn v., x. 512	768
Bergeron v. Lassalle	495
Berlinguet v. The Queen, xiii. 26	150, 685
Bernardin v. The Municipality of North Dufferin, xix. 581	160, 186, 555
Bernatchez, Beaubien v.	483
Bernier, Tremblay v., xxi. 409	580
Berteaux, Borden v., (King's County, N. S., Election Case), xix. 526	269
Berthier Election Case (Genereux v. Cuthbert), ix. 102	260
Bew v. Shortreed	500
Bickford v. Cameron, xxi. 879	66, 190, 457
v. Canada Southern Ry. Co. xiv. 748	737
v. The Corporation of the Town of Chatham, xvi. 285	153, 739, 815
v. Grand Junction Ry. Co., i. 696	689, 717
v. Hawkins, xix. 862	27
v. Howard	286
v. Lloyd	35, 673
Bigaouette v. The North Shore Ry. Co., xvii. 863	311
Billington v. Provincial Ins. Co. of Canada, iii. 182	359
Birkett v. McGuire	598
Blachford v. McBain, xix. 42	448
xx. 269	666
Black, Elle v., xiv. 740	243
v. Walker	768
Wheeler, v., xiv. 242	794
Black Diamond S. S. Co. of Montreal, Trainor v., xvi. 156	83
Blanchard, Bourget v.	423
Boak v. Merchants' Marine Insurance Co., i. 110	411, 677, 895
Bond, Connée v.	511
Boomer, McGreevy v.	139
Booth v. Ratté, xxi. 637	667
Borden v. Berteaux (King's County, N. S., Election Case), xix. 526	269
Boscowitz, Griffiths v., xviii. 718	661
Bossé, Paradis v., xxi. 419	66, 190
Bossom, Wallace v., ii. 488	340, 414
Bothwell Election Case (Hawkins v. Smith), viii. 676	259, 686
Bouchard, Couture v., xxi. 281	458
Boucher, <i>In re</i>	325
Ayotte v., ix. 460	418, 824
Boulanger, Grand Trunk Ry. Co. v.	733
Bourget v. Blanchard	423
Bowker v. Laumeister, xx. 175	856
Bowmanville Machine Co. v. Dempster, ii. 31	761
Boyce, The Phoenix Mut. Life Ins. Co. v., xiv. 728	375
Boyle, Cosgrave v., vi. 165	84

909

Name of Case and where reported.	Page of Digest.
Bradley, McLean v., ii. 535	164
Brady v. Stewart, xv. 82	510
Brantford, Waterloo & Lake Erie Ry. Co. v. Huffman, xix. 836.....	169
Brassard v. Langevin (Charlevoix Election Case), i. 145.....	248, 695
ii. 319	418
Breakey v. Carter	468
Brecken, Jenkins v., (Queen's County P. E. I. Election Case), vii. 247.....	256
Brien, Gauthier v., (L'Assomption Election Case), xxi. 29	277, 680
Brighthouse, The Corporation of the City of New Westminster v., xx. 520.....	556
Brisebois v. The Queen, xv. 421	197
British American Ass. Co., Gerow v., xvi. 524	894
v. Law, xxi. 325	397
British Can. Lumber Co., Grant v., xviii. 708.....	291
British Columbia, <i>In re</i> County Courts of, xxi. 446	485
British Columbia Towing Co., Sewell v., ("The Thrasher" Case), ix. 527	806
("The Thrasher" Case)....	480, 670, 675
Broadhead, The Penman Manufacturing Co. v., xxi. 713	18
Brodeur v. Charbonneau (Rouville Election Case), xxi. 28	276
Brodie, Aetna Life Ins. Co. v., v. 1	369, 673, 678
Brossard v. Dupras, xix. 581.....	323
Brown v. Allan.....	146
Darling v., i. 860.....	707
Darling v., ii. 26.....	800
The Dominion Salvage & Wrecking Co. v., xx. 203	452
Great Western Railway Ry. Co. of Canada v., iii. 159	718
v. Lamontagne	120
McArthur v., xvii. 61.....	281
Browne v. Pinsonneault, iii. 102.....	469
Brulé, Poirier v., xx. 97	855
Bruneau, Paradis v., (Richelieu Election Case), xxi. 168	277
Brunet, L'Association Pharmaceutique de la Province de Quebec v., xiv. 738..	600
Pilon v., v. 318	125, 680
Buck v. Knowlton, xxi. 371	897
Bull, The Imperial Fire Ins. Co., v., xviii. 697.....	366
Bulmer v. Dufresne	873
" The Union Bank of Canada v.	88
Burgess v. Conway, xiv. 90	788
Burkner, Wallace v	669
Barland v. Moffatt, xi. 76	59
Burnham v. Davison	846
v. Watson	681
Burns, Cassels v., xiv. 256	808
Burns, Commeau v., (Gloucester N. B. Election Case), viii. 204.....	258
Burroughs v. The Queen, xx. 420	203, 509
Bury, Forsyth v., xv. 543	790
Busby, Winchester v., xvi. 336	808
Butler v. Merchant's Marine Ins. Co	390
Butterfield, Grip Printing & Publishing Co. v., xi., 291	610, 687

Name of Case and where reported.	Page of Digest.
Byers v. McMillan, xv. 194.....	17
Byrne v. Arnold	107

C.

Cadwell, Shaw v. xvii. 357.....	601
Cahan, <i>In re</i> , xxi. 100	455, 700
Calder, Hutchison v.....	785
Caldwell, MacLaren v., viii. 435	821
Caldwell v. Stadacona F. & L. Ins. Co., xi. 212	360
Calgary School Trustees, Angus v., xvi. 716.....	443
Cambridge, Corporation of the Township of, The Canada Atlantic Ry. Co. v., xv. 219	184, 557
Cameron, Bickford v., xxi. 379	66, 190, 457
Domville v.	421, 684
Grant v., xviii. 716.....	506, 582
v. Harper, xxi. 273	309
McDonald v., (Inverness Election Case), xx. 169.....	272
McDougall v., xxi. 379	66, 190, 457
Mitchell v., (West Huron Election Case), viii. 126	259
Perry v., (Prince County, P. E. I., Election Case), xx. 26	271, 663
Pictou School Trustees v., ii., 690	166
v. Tate, xv. 622	9
v. Wait.....	332
Campbell v. Grieve, (North Perth Election Case), xx. 331	274
The Kingston & Bath Road Co. v., xx. 605	568
McDougall v., vi. 502	532
v. Patterson, xxi. 645.....	122
Canada Atlantic Ry. Co. v. The Corporation of the City of Ottawa, xii. 365 ..	550
v. The Corporation of the Township of Cambridge, xv. 219	184, 557
v. Moxley, xv. 145	738
Stanton, v.	430
Central Ry. Co. v. Murray. viii. 313	12
Company, Kyle v., xv. 188	672
Investment & Agency Co., McGregor v. xxi. 499	881
N. W. Land Co., Lynch v., xix. 204.....	484, 554
Publishing Co. v. Gage, xi. 306	840
Shipping Co., Hudon Cotton Co. v., xiii. 401	761
Southern Ry. Co., Bickford v., xiv. 743	737
v. Clouse, xiii. 139	735
v. Cunningham	34
v. Duff	34
v. Erwin, xiii., 162.....	736
v. Gatfield.....	34
v. Jackson, xvii. 316	743
v. Norvell	34, 673
v. Phelps, xiv. 132	725

Table of Cases in the Digest.

911

Name of Case and where reported.	Page of Digest.
Canada Temperance Act, 1878, and County of Kent.....	106
County of Perth.....	105, 679
Canadian Bank of Commerce, Federal Bank of Canada v., xiii. 384.....	788
Stevenson v. xxii.....	352
Canadian Pacific Ry. Co., Bate v., xviii. 697	747
v. Chalifoux.....	749
Cornwallis, Rural Municipality of, v., xix. 702....	54
v. Fleming, xxii. 38	459
Helliwell v.	522
v. Lawson.....	729
v. The Little Seminary of St. Thérèse, xvi. 606. . 441, 741	
Major v., xiii. 238	786
v. Neelon	522
v. Robinson, xiv. 105.....	222
v. Robinson xix. 292	5, 661, 710
Rural Municipality of Cornwallis, v., xix. 702	54
Shaw v., xvi. 708.....	407, 443
v. The Western Union Telegraph Co., xvii. 151,	
	123, 154, 185
Cannon v. Howland	111
Cape Breton, The Municipality of, Crewe-Read v., xiv. 8	527
The Municipality of the County of, v. McKay, xviii. 639	538
Carey v. City of Toronto, xiv. 172	786
Carrier v. Bender	674
Caron, O'Brien v. (Quebec County Election Case), xiv. 429.....	266
Carrick, Hunter v., xi. 300	611
Carrier, Bender v., xv. 19.....	151
Carson, Martley v., xiii. 439	704
xx. 634	757
Carter, Breakey v.	463
Grassett v., x. 105	19, 92, 229
Holmes v., xvi. 473	407, 694, 853
Muir v., xvi. 473.....	407, 694, 853
Macy & Co. v. The Queen, xviii. 706	207
Carvill v. Schofield, ix. 370	805
Cassels v. Burns, xiv. 256.....	808
Cassidy, Yon v., xviii. 713.....	842
Castons Case, <i>In re</i> . Standard Fire Ins. Co., xii. 644	180
Caverhill v. Robillard, ii. 575	584
Central Vermont Ry. Co. v. The Town of St. Johns, xiv. 288	52
Chagnon v. Normand, xvi. 661.....	442
Chalifoux, The Canadian Pacific Railway Co. v.	749
Chamberlin, Klock v., xv. 325	334
Champion, McKenzie v., xii. 649.....	784
Champoux v. Lapierre	426
Chandler Electric Co. v. Fuller, xxi. 337	569
Chaplin, Hathaway v., xxi. 23.....	325
Ontario Bank v., xx. 152	29, 79, 848, 672, 884
Chapman, Delaware Mut. Ins. Co. v.....	387

Name of Case and where reported.	Page of Digest.
Chapman v. Larin, iv. 349	133
Providence, Washington Ins. Co. v.	366
v. Rand, xi. 312	108
v. Tufts, viii. 543	83
Charbonneaux, Brodeur v. (Rouville Election Case), xxi. 28	276
Charland, The Queen v., xvi. 721	41
Charlebois v. Charlebois	592
Charlevoix Election Case (Brassard v. Langevin), i. 145	248, 695
(Brassard v. Langevin), ii. 819	413
(Cimon v. Perrault), v. 183	256
Chatham, Corporation of the Town of, Bickford v., xvi. 285	158, 739, 815
The Corporation of the Township of, The Corporation of the Town- ship of Sombra v. xxi. 805	561
v. Dover, xii. 321	548
Chaussé, Stephens v., xv. 379	223
Chesley v. Murdoch, ii. 48	283
The Queen v., xvi. 306	288
Simonds v., xx. 174	850
Chevalier v. Cuvillier, iv. 605	417
Chevrier v. The Queen, iv. 1	229, 231, 621
Chicoutimi & Saguenay Election Case	682
Chisholm v. Kenny	539
Chisholm, McLennan v. (Glengarry Election Case), xx. 88	272, 663
Chittick, Creighton v., vii. 348	340
Cholette v. Bain (Soulanges Election Case), x. 652	264
Choquette v. Laberge (Montmagny Election Case), xv. 1	267
Christie, City of St. John v., xxi. 1	559
Christie v. Morrison (Argenteuil Election Case), xx. 194	274, 666
Church, Abell v., i. 442	761
Church v. Fenton, v. 239	48
Churchill v. McKay, <i>Re Ship "Quebec,"</i> xx. 472	655
Cimon v. Perrault (Charlevoix Election Case), v. 183	256
Citizens Insurance Co., Green v., xviii. 338	42
v. Johnston, iv. 215	476, 678
v. Parsons, iv. 215	476, 678
City of Fredericton v. The Queen, iii. 505	590
City of Halifax v. Kenny, iii. 497	805
v. Lordly, xx. 505	555
Oakes v., iv. 640	33
v. Walker	175
City of Hamilton v. Corporation of the Township of Barton, xx. 173	555
City of London Fire Ins. Co. v. Smith, xv. 69	364
City of Montreal, Atty.-Gen. of Canada v., xiii. 352	50, 674
Bain v., viii. 252	46
v. Hall, xii. 74	511, 680
v. Labelle, xiv. 741	222
Les Ecclesiastiques de St. Sulpice Mont. v., xvi. 399	52, 440, 711
Longueil Navigation Co. v., xv. 566	492
Wylie v., xii. 384	50

Table of Cases in the Digest.

913

Name of Case and where reported.	Page of Digest.
City of Ottawa, O'Meara v., xiv. 742	498
City of Portland, Williams v., xix. 159	554
City of Quebec, The Bell Telephone Co. of Canada v., xx. 230 ..	452
Piché v.	497
The Quebec Gas Co. v., xx. 230	452
v. The Quebec Central Ry. Co., x. 563	819
City of Saint John v. Christie, xxi. 1	559
MacDonald, xiv. 1	551
Peters v., xxi. 674	56
Timmerman v., xxi. 691	55
City of Toronto, Atty.-Gen. of Canada v.,	57
Carey v., xiv. 172	786
City of Winnipeg, Barrett v., xix. 374	484
v. Wright, xiii. 441	681
Clark v. Clark, xvii. 376	879
The Queen v., xxi. 656	459
v. Scottish Imperial Ins. Co., iv. 192	358, 688
Green v.,	614
v. Odette (The "Marion Teller")	521
Shoolbred v. (<i>In re</i> Union Fire Ins. Co.), xvii. 265	658, 888
<i>In re</i> Virtue v. Hayes, xvi. 721	444
v. White, iii. 309	10
Clarkson v. Ryan, xvii. 251	61, 445, 483
Claude, Weir v., xvi. 575	584
Cleveland, Lamb v., xix. 78	284, 817
Close, Temple v.,	765
Clouse, Canada Southern Ry. Co., v., xiii. 189	735
Cogswell, O'Brien v., xvii. 420	58, 508
Cogswell, Webber v., ii. 15	499
Colchester v. Watson,	175
Coleman, Hayes v.,	838
Coleman v. Miller,	301, 678, 683
Collette v. Lasnier, xiii. 563	611
Collins v. Cunningham, xxi. 189	546
Collins v. Everitt,	210
Collins v. Ross, (<i>Lisgar</i> Election Case), xx. 1	270, 663
Colter v. Glenn, (<i>Haldimand</i> Election Case), xvii. 170	268
Colville, Titus v., xviii. 709	292
Commeau v. Burns, (<i>Gloucester N. B.</i> Election Case), viii. 204	258
Commercial Union Ins. Co., Logan v., xiii. 270	363
Commercial Union Ass. Co., Summers v., vi. 19	359
Commissaires d'Ecole pour la Municipalité de St. Marc, Langevin v., xviii. 599 ..	447
Confederation Life Ass. of Can. v. Miller, xiv. 830	374
v. O'Donnell,	370
v. O'Donnell, x. 92	371
v. O'Donnell, xiii. 218	372
v. O'Donnell, xvi. 717	373
Conmee v. Bond,	511

Name of Case and where reported.	Page of Digest.
Connecticut Mut. Life Ins. Co., <i>Moore v.</i> , vi. 684	419, 695
Connecticut & Passumpsic Rivers Railway Co. v. <i>Morris</i> , xiv. 318	300
Connely, <i>The Guardian Ass. Co. v.</i> , xx. 208	367
Connolly, <i>The Provincial Ins. Co. of Can. v.</i> , v. 258	379
Conway, <i>Burgess v.</i> , xiv. 90	788
Corbett, <i>Anchor Marine Ins. Co. v.</i> , ix. 73	380
Corbett, <i>McKenzie v.</i> ,	384
Corbett, <i>The Providence Washington Ins. Co. v.</i> , ix. 256 ..	383
Corby v. <i>Williams</i> , vii. 470	761
Cornell, <i>Walker v.</i> ,	595
Cornwallis, <i>The Rural Municipality of, v. The Can. Pac. Ry. Co.</i> , xix. 702 ..	54
Corporation of <i>Aubert-Gallion v. Roy</i> , xxi. 456	837
Chatham v. Corporation of <i>Dover</i> , xii. 321	548
the City of <i>London v. Goldsmith</i> , xvi. 231	552
Montreal, <i>Wylie v.</i> , xii. 884	50
New Westminster v. <i>Brighthouse</i> , xx. 520	556
Ottawa, Canada Atlantic Ry. Co. v., xii. 365	550
Quebec, <i>Lefebvre v.</i> ,	176
Poulin v., ix. 185	480
The Quebec Central Ry. Co. v., x. 563.. 721, 819	
Street Ry. Co. v., xv. 164	184
v. The Queen	640
Sherbrooke v. <i>McManamy</i> , xviii. 594	446
Three Rivers, <i>Major v.</i> ,	422
Sulte v., xi. 25	481
Toronto, <i>Godson v.</i> , xviii. 36	714
County of Ottawa v. The Montreal, Ottawa and Western	
Ry. Co., xiv. 193	221
County of Peterborough, The Corporation of the County of	
Victoria v.,	558
Pontiac v. <i>Ross</i> , xvii. 406	743
Vercheres v. The Corporation of the Village of	
Varennes, xix. 365	27
Victoria v. The Corporation of the County of	
Peterborough	558
de la Paroisse de Ste. Anne du Bout de L'Isle, <i>Reburn v.</i> , xv. 92..	183
Peterboro', <i>Grand Junction Ry. Co. v.</i> , viii. 76	101
St. Gabriel v. <i>Les Soeurs, etc., de Notre Dame de Montreal</i> , xii. 45	51
St. Gabriel, <i>St. James v.</i> ,	147
the Township of Chatham, The Corporation of the Township	
of <i>Sombra v.</i> , xxi. 305	561
Town of Palmerston, The Waterous Engine Works Co. v.,	
xxi. 556	562
Township of Barton, The City of <i>Hamilton v.</i> , xx. 173	555
Cambridge, The Canada Atlantic Ry. Co. v.,	
xv. 219	184, 557
Town of Chatham, <i>Bickford v.</i> , xvi. 235	153, 739, 815
Levis v. The Queen, xxi. 31	313
McGillivray, <i>Hislop v.</i> , xv. 188	672

Table of Cases in the Digest.

915

Name of Case and where reported.	Page of Digest.
Corporation of the Town of McGillivray, Hialop v., xvii. 479	333
Township of Raleigh, Williams v., xxi. 103	560
Sombra v. The Corporation of the Township of Chatham, xxi. 305	561
Village of Huntington, Moir v., xix. 363	189, 449
St. Rose, Dubois v., xxi. 65	455
Varennes, The Corporation of the County of Vercheres v., xix. 365	27, 449
Corse, Harrington v., ix. 412	872
Cosgrave v. Boyle, vi. 165	84
Cosgrave Brewing and Malting Co., of Toronto, Starrs v., xii. 571	599, 697
Cossette v. Dun, xviii. 222	25, 225, 446, 491
Coté v. Morgan, vii. 1	676, 712
Stadacona Fire and Life Ins. Co. vi. 198	167, 682, 683
Coughlin, Gray v., xviii. 553	545
County Courts of British Columbia, <i>In re</i> , xxi. 446	495
County of Halton, The Grand Trunk Ry. Co. v., xxi. 716	91
Kent, <i>In re</i> Canada Temperance Act, 1878	106
Ottawa v. Montreal, O. & W. Ry. Co. xiv. 198	221
Perth, <i>In re</i> Canada Temperance Act, 1878	105, 679
York, Toronto Gravel Road Co. v., xii. 517	16
Couture v. Bouchard, xxi. 281	468
Cox, Gunn v., iii. 296	284
v. Sutherland	10
Craigien, North American Life Assur. Co. v., xiii. 278	374
Creelman, Kearney v., xiv. 33	542, 786
Creighton v. Chittick, vii. 348	340
Duffus v., xiv. 740	803
v. The Halifax Banking Co., xviii. 140	603
v. Kuhn	845
Crewe-Read v. The Municipality of the County of Cape Breton, xiv. 8	527
Crombie, McDonald v., xi. 107	320
Crompton Corset Company, The, Ball v., xiii. 469	612
Cross, The Windsor Hotel Co. of Montreal v., xii. 624	787
Crosson, Johnson v.	848
Crowe v. Adams, xxi. 342	804
Crowley, Dorion v.,	694, 709
Crysler, McKay v., iii. 436	47
Cumming, Nicholls v., i. 395	45
Cummings, Gladwin v.,	426
Cunningham, Canada Southern Ry. Co. v	34
Collins v., xxi. 139	546
v. Drysdale, xxi. 139	546
v. The Queen	194
Curran, O'Keefe v., xvii. 596	601
Currie, White v.,	811
Curry v. Curry	676, 778
Cuthbert, Genereux v., (Berthier Election Case), ix. 102	260
Cuvillier, Chevalier v., iv. 605	417

D.

Name of Case and where reported.	Page of Digest.
Danaher v. Peters, xvii. 44.....	483, 815
Danjon v. Marquis, iii. 251	414
Danks v. Dunham	89
Dansereau v. Bellemare, xvi. 180.....	612
Letourneau v., xii. 807	347, 677
v. St. Louis, xviii. 587	87, 269
Darling, Barsalou v., ix. 677.....	839
v. Brown, i. 360	707
ii. 26.....	300
v. Ryan	435
Dartmouth, The Warden, etc., of, The Queen v., ix. 509	515
xiv. 45	515
Daveluy, La Société Canadienne Française de construction de Montreal v., xx. 449	104, 349, 453
Davidson, Gates v.....	847
Lord v., xiii. 166	684, 807
Oliver v., xi. 166	874
The Queddy River Driving Boom Co. v., x. 222	478
Davies v. Hennessy (Queen's County P. E. I. Election Case), xx. 26	271, 663
Davis v. Kerr, xvii. 235	858
Davison v. Burnham	846
Dawson v. Dumont, xx. 709	30, 65, 454, 711
McDonald	586, 683
Ogden	797
The Union Bank of Lower Canada.....	428
De Beaujeu, Filiatrault v. (Soulanges Election Case)	676, 682
De Blaquiére, Synod of the Diocese of Toronto v.....	537
Dedrick v. Ashdown, xv. 227.....	118
Delaware Mut. Safety Ins. Co. v. Chapman.....	887
Demers v. Duhaime, xvi. 866	859
Dempster, Bowmanville Machine Co. v., ii. 21	761
Denmark, McConaghy v., iv. 609.....	504
Desilets, Gingras v.....	212
Deslauriers, Larue v. (Bellechasse Election Case), v. 91	255
Desmarteau, Hurtubise v., xix. 562	29, 451
Dessert, Guilbault v. (Joliette Election Case), xv. 458	267
Dewe v. Waterbury, vi. 143	810
DeWolf, Jones v.,	767
Dickie v. Woodworth (King's County N. S. Election Case), viii. 192.....	258
Woodworth v., xiv. 784	91
Dickson, Kearney v.....	431
v. Kearney, xiv. 743	333
Dillon v. The Township of Raleigh, xiv. 789.....	183
Diocesan Synod of Nova Scotia v. Ritchie, xviii. 705.....	233
Dixon, Dufresne v., xvi. 596	803
v. Richelieu Navigation Co., xviii. 704.....	109
Dobell, Magog Textile and Print Co. v., xiv. 664.....	182

Table of Cases in the Digest.

917

Name of Case and where reported.	Page of Digest.
Dominion of Canada Land & Colonization Co., Hall v., viii. 681	830
Dominion Salvage & Wrecking Co. v. The Attorney-General of Canada, xxi. 72 ..	187
Brown, xx. 208	452
Dominion Telegraph Co. v. Gilchrist.....	844
Silver, x. 288.....	489
Domville v. Cameron.....	421, 684
Gleeson	848
Donovan Herbert v.....	658, 706
Doran v. Ross	829
Dorion v. Crowley	694, 709
Dorion, xiii. 198	828
xx. 480	3, 879
Dorland, Jones v., xiv. 89	716
Doull, McDonald v.....	884
v. McIlreith, xiv. 789	22
Western Assurance Co. v., xii. 446	862
Doutre, The Queen v., vi. 842	623
Dover, Chatham v., xii. 321	548
Downie v. The Queen, xv. 358	195
Draper v. Radenhurst, xxi. 714	886
Driscoll, Millville Mut. Mar. & Fire Ins. Co. v., xi. 188.....	385, 401
Drummond v. Baylis, ii. 61	92
Drysdale, Cunningham v., xxi. 189.....	546
Dubois v. The Corporation of the Village of St. Rose, xxi. 65.....	455
Dubuc v. Kidston.....	779
v. Kidston, xvi. 357.....	288, 336, 656
Ducondu, Dupuy v., vi. 425	773
Duff, Can. Southern Ry. Co. v.....	34
Duffus v. Creighton, xiv. 740.....	803
Royal Ins. Co. v., xviii. 711	293
Dufresne, Bulmer v.....	873
v. Dixon, xvi. 596	803
v. Prefontaine, xxi. 607	101
Dugas, Magnan v., (Montcalm Election Case), ix. 93.....	261
Duggan v. Duggan, xvii. 848.....	878
v. The London and Canadian Loan Co., xx. 481	856
Miller v., xxi. 83	752
Duhaime, Demers v., xvi., 366	859
Dumont, Dawson v., xx. 709.....	80, 65, 454, 711
Dumoulin v. Langtry, xiii. 258	671, 751
Dun, Cossette v., xviii. 222	25, 225, 446, 491
Duncan, Rogers v., xviii. 710	243
Dunham, Danks v.	89
Dunn, The Queen v., xi. 885	689
Dupont v. Morin, (Bagot Election Case), xxi. 28.....	276
Dupras, Brossard v., xix. 531	828
Dupuy v. Ducondu, vi. 425.....	778
Dussault, Belleau v., (Levis Election Case), xi. 133.....	265, 686
Dyment, Thomson v., xiii. 808.....	769

E.

Name of Case and where reported.	Page of Digest.
Edmonds v. Tiernan, xxi. 406	526
Edwards v. Mayor, etc., of St. John	48
Eisenhauer, Kaulbach v., (Lunenburg Election Case), xx. 169	272
Electric Despatch Company of Toronto v. The Bell Telephone Company of Canada, xx. 88	161
Elliott, Flanagan v., xii. 435	51
Peers v., xxi., 19	530
Ellis v. Baird, xvi. 147	189, 438
Power v., vi. 1	885
v. The Queen, xxii. 7	133, 458
Ells v. Black, xiv. 740	243
Emerald Phosphate Co. v. Anglo Continental Guano Works, xxi. 422	457
Emerson v. Bannerman, xix. 1	120
Erb v. The Great Western Ry. Co., v. 179	719
Erwin, Canada Southern Ry Co. v., xiii. 162	736
Esquimalt & Nanaimo Ry. Co., Hoggan v., xx. 235	206
Waddington v., xx. 255	206
Eason v. McGregor, xx. 176	88
Eason, Wood v., ix. 239	563
Eureka Woollen Mills Co. v. Moss, xi. 91	481, 575
Evans v. Skelton, xvi. 637	466
Everitt, Collins v.,	210
Exchange Bank of Canada, Barnes v., xiv. 716	75
v. Fletcher, xix. 278	78
v. Gilman, xvii. 108	658, 675
v. The People's Bank	79
Springer v., xiv. 716	75

F.

Fairbanks v. Barlow, xiv. 217	648
Fairchild v. Ferguson, xxi. 484	90
Farmer v. Livingstone, v. 221	497
v. Livingstone, viii. 140	607
Farwell, The Ont. Car Co. v., xviii. 1	745
The Queen v., xiv. 392	715
Wallbridge v., xviii. 1	745
Faulds v. Harper, xi. 639	541
Fauteux, Montreal Loan & Mortgage Co. v., iii. 411	20, 797
Fawcett v. Anderson	8
Federal Bank of Canada v. Canadian Bank of Commerce, xiii. 384	798
Fenton, Church v., v. 239	48
Ferguson, Fairchild v., xxi. 484	90
v. Ferguson, ii. 497	865
v. Troop, xvij. 527	466
Ferland, Flatt v., xxi. 82	454
Fielding v. Mott, xiv. 254	526

Table of Cases in the Digest.

919

Name of Case and where reported.	Page of Digest.
<i>Filiatrault v. De Beaujeu</i> (Soulanges Election Case)	676, 682
Hardy v., xvii. 292	842
<i>Fisher v. Anderson</i> , iv. 406	677, 868
<i>Fisher, Jones v.</i> , xvii. 515	756
<i>Fisk, Stevens v.</i>	235
<i>Fitzgerald, The Grand Trunk Ry. Co. v.</i> , v. 204	720
<i>The Grand Trunk Ry. Co. v.</i> , xix. 859	295
<i>v. McKinlay</i>	107
<i>Fitzrandolph v. The Mutual Relief Society of Nova Scotia</i> , xvii. 333	376
<i>Shanly v.</i> ,	279
<i>Flanagan v. Elliott</i> , xii. 435	51
<i>Flatt v. Ferland</i> , xxi. 32	454
<i>Fleming, Canadian Pacific Ry. Co. v.</i> , xxii. 33	459
<i>Fletcher, The Exchange Bank of Canada v.</i> , xix. 278	78
<i>Flint, Attorney-General of Canada v.</i> , xvi. 707	591
<i>Foley, Webster v.</i> , xxi. 580	525
<i>Fonseca v. The Attorney-General of Canada</i> , xvii. 612	488, 754
<i>Foot v. Foot</i> , xv. 699	878
<i>Forristal v. McDonald</i> , ix. 12	422, 698, 763
<i>Forsythe v. The Bank of Nova Scotia (In re The Bank of Liverpool)</i> , xviii. 707 ..	883
<i>Forsyth v. Bury</i> , xv. 543	790
<i>McAllister v.</i> , xii. 1	116
<i>Fournier, Leger v.</i> , xiv. 314	789
<i>Fraser v. Abbott</i>	695
<i>v. Bell</i> , xiii. 546	646
<i>Jones v.</i>	678
<i>Jones v.</i> xiii. 342	877
<i>v. Pouliot</i> , iv. 515	228
<i>Proulx v. (Prescott Election Case)</i> , xx. 196	274, 665
<i>v. Stephenson</i>	575
<i>v. Tupper</i>	421
<i>Wallace v.</i> , ii. 522	234
<i>Frechette v. Goulet (Megantic Election Case)</i> , viii. 169	259, 676
ix. 279	262
<i>Fredericton, City of, v. The Queen</i> , iii. 505	590
<i>Frey, The Mut. F. Ins. Co. of the County of Wellington v.</i> , v. 82	356
<i>Fuller v. Ames</i>	140
<i>The Chandler Electric Co. v.</i> , xxi. 337	569
<i>Fulton v. McNamee</i> , ii. 470	402

G.

<i>Gage, Canada Publishing Co. v.</i> , xi. 306	840
<i>Gagnon v. Prince</i> , vii. 386	285
<i>Galarneau v. Guilbault</i> , xvi. 579	316, 440
<i>Gallagher v. Taylor</i> , v. 368	380
<i>Gardner v. Kloepper</i> , xv. 390	60
<i>Garland, The (Monaghan v. Horn)</i> , vii. 409	518
<i>v. Gemmill</i> , xiv. 321	163

Name of Case and where reported.	Page of Digest.
Garland, McLean v., xiii. 366	320
Gates v. Davidson	847
Gatfield, Canada Southern Railway Co. v.	34
Gauthier v. Brien (L'Assomption Election Case), xxi. 29.....	277, 680
v. Normandeau (L'Assomption Election Case), xiv. 429.....	266
Geddes, Wilkins v., iii. 208	415
Gemley, Low v., xviii. 685.....	309
Gemmill, Garland v., xiv. 321	163
Gendron v. McDougall	429
Genereux v. Cuthbert (Berthier Election Case), ix. 102	260
Georgian Bay Lumber Co., The, v. Macdonald, ii. 364.....	339
German v. Rothery (Welland Election Case), xx. 376	275
Gerow v. The British American Assur. Co., xvi. 524.....	394
Providence Washington Ins. Co. v., xiv. 731	392, 675
Providence Washington Ins. Co. v., xvii. 387.....	395
v. The Royal Can. Ins. Co., xvi. 524.....	394
Gerriken, Reeves v.,	689
Gibbins v. Barber, xix. 204	484, 554
Gibbons v. McDonald, xx. 587.....	64, 707
Gibbs, Wheeler v. (North Ontario Election Case), iii. 374.....	253, 416
(2), iv. 430	254
Gibeault v. Pelletier (Laprairie Election Case), xx. 185	273, 665
Gibraltar v. Hughes	174
Gilbert v. Gilman, xvi. 189	438
Jonas v., v. 356	494
McDonald v., xvi. 700.....	24, 290
Gilchrist, Dominion Telegraph Co. v.,	844
Gillespie, Merchants' Bank of Halifax v., x. 312.....	169
v. Stephens, xiv. 709.....	2
Gilman, Exchange Bank of Canada v., xvii. 108....	658, 675
Gilbert v., xvi. 189	438
Gilmour v. Magee, xviii. 579.....	467
Gingras v. Desilets	212
v. Symes.....	14
Giraldi v. Bank Jacques Cartier, ix. 597	67
Gladwin v. Cummings	426
Gleeson, Domville v.	343
Glen, McKay v. (South Ontario Election Case), iii. 641	252
Glengarry Election Case (McLennan v. Chisholm), xx. 38	272, 663
(Purcell v. Kennedy), xiv. 458	266
Glenn, Colter v. (The Haldimand Election Case), xvii. 170	268
Gloucester, N. B., Election Case (Commeau v. Burns), viii. 204.....	258
Godeon v. The Corporation of the City of Toronto, xviii. 36	714
Goldie, Smith v., ix. 46.....	608, 689
Goldsmith, The Corporation of the City of London v., xvi. 231.....	552
Gore District Mut. Fire Ins. Co. v. Samo, ii. 411	355
Goulet, Frechette v. (Megantic Election Case), viii. 169.....	259, 676
ix. 279	262
Grand Junction Ry. Co., Bickford v., i. 696.....	689, 717

Table of Cases in the Digest.

921

Name of Case and where reported.	Page of Digest.
Grand Junction Ry. Co. v. Corporation of Peterboro', viii. 76	101
Grand Trunk Ry. Co. of Canada v. Beckett, xvi. 718	742
v. Boulanger	788
v. County of Halton, xxi. 716	91
v. Fitzgerald, v. 204	720
xix. 859	295
Jones v., xviii. 696	746
v. McMillan, xvi. 548	153, 657, 740
v. Morton	782
v. Rosenberger, ix. 811	720
v. Sibbald, xx. 259	748
v. Tremayne, xx. 259	748
v. Vogel, xi. 612	782
v. Wilson	722
Grange v. McLennan, ix. 885	774
Grant v. Beaudry	581
v. The British Canadian Lumber Co., xviii. 708	291
v. Cameron, xviii. 716	506, 582
The People's Loan & Deposit Co. v., xviii. 862	400
v. The Queen, xx. 297	203, 675
Grasett v. Carter, x. 105	19, 92, 229
Gray v. Coughlin, xviii. 553	545
v. Richford, ii. 431	866
Great Eastern Railway Co. v. Lambe, xxi. 431	649
Great North-Western Telegraph Co. v. The Montreal Telegraph Co., xx. 170 ..	472
Great Western Ins. Co. v. Jordan, xiv. 784	398
Great Western Ry. Co. v. Brown, iii. 159	718
v. Erb, v. 179	719
Green v. The Citizens' Ins. Co. xviii. 838	42
v. Clarke	614
Greene v. Harris, xvi. 714	796
Holman v., vi. 707	331
Greenwood, White v., (Shelburne Election Case), xx. 169	272
Gregoire v. Gregoire, xiii. 819	857
Gregory, Halifax & Cape Breton Ry. & Coal Co. v.	727
Grieve, Campbell v., (North Perth Election Case), xx. 831	274
Griffiths v. Boscowitz, xviii. 718	661
Town of Portland v., xi. 833	177
Griffith, Walmsley v., xiii. 434	704
.....	670, 697, 699
Grinnell v. The Queen, xvi. 119	207, 815
Grip Printing & Publishing Co. v. Butterfield, xi. 291	610, 687
Guardian Assur. Co. v. Connely, xx. 208	367
Guardian Fire and Life Assur. Co., Hobbs v., xii. 631	362
Guay v. The Queen, xvii. 30	311
Guelph Lumber Co., Petrie v., xi. 450	178
Guilbault v. Dessert (Joliette Election Case), xv. 458	267
Galarneau v., xvi. 579	316, 440
v. McGreevy, xviii. 609	156

Name of Case and where reported.	Page of Digest.
Guilford v. The Anglo-French S. S. Co., ix. 308	137
Guillet, Henderson v., (West Northumberland Election Case), x. 635	263
Gunn v. Cox, iii. 296	284

H.

Hackett v. Perry (Prince County, P. E. I. Election Case), xiv. 265	265
Haffner, Bank of Montreal v., (Bank of Montreal v. Worswick).....	526
Hagar, Seath v., xviii. 715.....	448
Haldimand Election Case (Colter v. Glenn), xvii. 170	268
(Walsh v. Montague), xv. 495	268
Halifax Banking Co., Creighton v., xviii. 140	603
v. Matthew, xvi. 721	119
Nova Scotia Central Railway Co. v., xxi. 536.....	749
v. Smith, xviii. 710.....	203
& Cape Breton Ry. & Coal Co. v. Gregory.....	727
Hockin v.,	423
Levy v.,	579
City of v. Kenny, iii. 497.....	805
v. Lordly, xx. 505	555
v. Oakes, iv. 640.....	83
v. Walker.....	175
City Ry. Co. v. The Queen	37, 679
Street Ry. Co. v. Joyes, xvii. 709	446
Hall v. Dominion of Canada Land and Colonization Co., viii. 631	830
v. McFadden	723
Montreal v., xii. 74.....	511, 680
Halter, Molson's Bank v., xviii. 88	62
Halton, County of, The Grand Trunk Ry. Co. v., xxi. 716	91
Election Case (Lush v. Waldie), xix. 557.....	28, 270, 682
Hamilton, City of, v. The Corporation of the Township of Barton, xx. 173....	555
Peters v	763
Hampson, Wineberg v., xix. 369	450
Hancock, Long v., xii. 532	321
Hannan, Ross v., xix. 227	773
Hannon, McLean v., iii. 706	850
Hanson, Allen v., xviii. 667	132, 591, 883
Hardman v. Putnam, xviii. 714	660
Hardy v. Filiatrault, xvii. 292	842
Harper, Cameron v., xxi. 273	309
Harper, Faulds v., xi. 639	541
Harrington v. Corse, ix. 412	872
Harris, Greene v., xvi. 714	796
Harris v. Robinson, xxi. 390	814
Hart, Joyce v., i. 821	231, 412, 531
Hart, Troop v., vii. 512	762
Harty, O'Sullivan v., xi. 822	808
xiii. 481	703

Table of Cases in the Digest.

923

Name of Case and where reported.	Page of Digest.
Harvey v. The Bank of Hamilton, xvi. 714	86
Picton Bank v., xiv. 617	770
Hastings Mut. F. Ins. Co. v. Shannon, ii. 394	355
Hateley, Merchants Despatch Transportation Co. v., xiv. 572	124
Hathaway v. Chaplin, xxi. 23	325
Hawkins, Bickford v., xix. 862	27
v. Smith (Bothwell Election Case), viii. 676	259, 686
Hayes v. Coleman	833
Hayes, Virtue v. In re Clarke, xvi. 721	443
Hebert, Pinsonneault v., xiii. 450	654
Hedge, McMillan v., xiv. 736	795
Heffernan, Walsh v., xiv. 738	716
Helliwell, Canadian Pacific Ry. Co. v.,	522
Henderson v. Guillet (West Northumberland Election Case), x. 635	263
Henderson, Osborne v., xviii. 698	603
Hennessey, Davies v., (Queen's County, P. E. I., Election Case), xx. 26 ..	271, 663
Herbert v. Donovan	653, 706
Hett v. PunPong, xviii. 290	812
Heward v. O'Donohoe, xix. 341	507, 654
Hickey, Rose v.,	534
Higgins v. Walkem, xvii. 225	491, 658
Hislop v. The Corporation of the Town of McGillivray, xv. 188	672
Township of McGillivray, xvii. 479	333
Hobbs v. The Guardian Fire and Life Assur. Co. xii. 631	362
Northern Assur. Co. xii. 631	362
Ontario Loan & Debenture Co. xviii. 483	514
Hochelaga Bank, The Union Bank of Lower Canada v.,	350
Hockin v. Halifax & Cape Breton Ry. & Coal Co	423
Hoe, Mullin v.,	219
Hoggan v. The Esquimalt & Nanaimo Ry. Co. xx. 235	206
Holland, Mitchell v., xvi. 687	853
v. Ross, xix. 566	205
Holman v. Green, vi. 707	331
Holmes v. Carter, xvi. 473	407, 694, 853
Hood, McIntyre v., ix. 556	775
v. Sangster, xvi. 723	444
Horn, Monaghan v., (The Garland), vii. 409	518
Hosterman, Lecain v.,	827
Houghton v. Bell	380
Hovey v. Whiting, xiv. 515	181
Howard, Bickford v.,	286
v. Lancashire Ins. Co. xi. 92	361, 431
Howe, Lewin v., xiv. 722	20
Howland, Cannon v.,	111
Hubert, The Queen v., xiv. 737	39
Hubley, Archibald v., xviii. 116	119, 300, 659
Hudon Cotton Co. v. Canada Shipping Co. xiii. 401	765
Huffman, The Brantford, Waterloo & Lake Erie Ry. Co. v., xix. 336	169
Hughes, La Compagnie de Villas du Cap Gibraltar v., xi. 537	174

Name of Case and where reported.	Page of Digest.
Humphrey v. The Queen xx. 591	161, 304
Hunter v. Carrick, xi. 300	611
Ross v., vii. 289	843
Huntingdon, Corporation of the village of, Moir v., xix. 363	189, 449
Huron, West, Election Case (Mitchell v. Cameron), viii. 126	259
Wright v., xi. 95	126, 673
Hurteau, Ross v. xviii. 713	772
Hurtubise v. Desmarceau, xix. 562	29, 451
Hus v. The School Commissioners for the Municipality of Ste. Victoire, xix. 477	245
Huson v. The Township of South Norwich, xxi. 669	562
Hutchison, Trustees of the St. John Y. M. C. A. v.,	210
Hutchinson v. Calder	785

I.

Imperial Fire Ins. Co. v. Bull, xviii. 697	366
Ins. Co., Wyman v., xvi. 715	365
Loan & Investment Co., Kelly v., xi. 516	540
Incorporated Synod of the Diocese of Huron, Wright v., xi. 95	126, 673
Inga v. The Bank of P. E. I., xi. 265	70
Inverness Election Case (McDonald v. Cameron), xx. 169	272
Irvine, Williams v., xxii.	461
Isbester v. The Queen, vii. 696	628

J.

Jackson, The Canada Southern Ry. Co. v., xvii. 316	743
Jacobs v. The Queen, xvi. 438	197
Jacques Cartier Election Case (Somerville v. Laflamme), ii. 216	249, 284
James, Scammell v., xvi. 593	441
Jamieson v. Steele	465
Jellett, Anderson v., ix. 1	315
Jenkins v. Brecken (Queen's County P. E. I. Election Case), vii. 247	256
John Owen, The (Owen v. Odette)	519
John v. The Queen, xv. 884	196
Johnson v. Crosson	848
G. R., <i>In re</i>	329, 677
The Peoples Bank of Halifax v., xx. 541	161
Johnston, Western Ins. Co. v., iv. 215	476
The Minister, etc., St. Andrew's Church, Montreal v., i. 235	643
Oliver v.	651
The Citizens Insurance Co. v., iv. 215	476, 678
The Western Ins. Co. v., iv. 215	678
Joliette Election Case (Guilbault v. Dessert), xv. 458	267
Jonas v. Gilbert, v. 856	494
Jones v. DeWolf	767
Dorland, xiv. 39	716
Fisher, xvii. 515	756
Fraser	678
xiii. 342	877

Table of Cases in the Digest.

925

Name of Case and where reported.	Page of Digest.
Jones v. The Grand Trunk Railway Co. of Canada, xviii. 696	746
Kinney, xi. 708.....	846
McKean v., xix. 489.....	662
Moody v., xix. 266	5, 159, 710
v. The Queen, vii. 570	618
Shorey v., xv. 898.....	60
v. Tuck, xi. 197.....	19, 35
Jordan v. Great Western Ins. Co. v., xiv. 784	898
Joyce, Halifax Street Ry. Co. v., xvii. 709.....	446
v. Hart, i. 321	281, 412, 531

K.

Kandick v. Morrison, ii. 12	413
Kane v. Magee	247
Wright v.....	596
Kaulback, Beamish v., iii. 704	417, 677
v. Eisenhauer, (Lunenburg Election Case), xx. 169	272
Kean, Kearney v.,	672, 684
Kearney v., iii. 332	867
Kearney v. Creelman, xiv. 38	542, 786
v. Dickson ..	431
Dickson v., xiv. 743.....	333
v. Kean	672, 684
v. Kean, iii. 332	867
v. Oakes, xviii. 148	312, 582
v. The Queen	313
Keefer, Merchants' Bank of Canada v., xiii. 515.....	688, 875
Keith, Anchor Marine Ins. Co. v., ix. 483.....	382
McCuaig v., (The Pictou), iv. 648	19, 517
Kelly v. Imperial Loan and Investment Co., xi. 516	540
v. Sullivan, i. 1	32, 411, 695, 825
Kennedy v. Pigott, xviii. 699.....	42
Purcell v., (Glengarry Election Case), xiv. 453	266
Kenny, Chisholm v	539
City of Halifax v., iii. 497	805
v. The Queen.....	636
Kent, County of, <i>In re</i> Canada Temperance Act, 1878	106
Keroack, McKinnon v., xv. 111	322, 437
Kerr, Davis v., xvii. 285.....	858
Milloy v., viii. 474.....	676, 863
Kidston, Dubuc v.,	779
Dubuc v., xvi. 357	238, 336, 656
King, The Rector, etc., of St. George's Parish Parrsboro' v., ii. 143	32
Seston v., xviii. 712	294
King's County N.S. Election Case, (Borden v. Berteaux), xix. 526.....	269
(Dickie v. Woodworth), viii. 192.....	258
Kingston and Bath Road Co. v. Campbell, xx. 605.....	568
Pembroke Ry. Co. v. Murphy, xvii. 582	744

Name of Case and where reported.	Page of Digest.
Kinloch v. Scribner, xiv. 77	770
Kinney, Jones v., xi. 708	346
Kittridge, McKenzie v., iv. 368	165, 684
Klock v. Chamberlin, xv. 325	334
Kloepfer, Gardner v., xv. 390	60
v. Warnock, xviii. 701	62
Knight, McCorkill v., iii. 233	585, 694
Penrose v.,	689, 776
v. Whitfield	186
Knowlton, Buck v., xxi. 371	397
Kuhn, Creighton v.,	845
Kyle v. The Canada Co., xv. 188	672

L.

Labelle v. Barbeau, xvi. 390	439
City of Montreal v., xiv. 741	222
Laberge, Choquette v., (Montmagny Election Case), xv. 1	267
Labrecque, Amyot v., (Bellechase Election Case), xx. 181	273, 296
La Caisse d'Economie de Notre Dame de Quebec, Petry v., xix. 713	855
La Corporation de la Paroisse de Ste. Anne du Bout du l'Isle, Reburn v., xv. 92. 183	
La Compagne de Villas du Cap Gibraltar v. Hughes, xi. 537	174
Lacoste v. Wilson, xx. 218	239
Lafamme, The Mail Printing Co. v.,	493
Somerville v., (Jacques Cartier Election Case), ii. 216	249, 284
Laird, Ross v.,	851
Lake, O'Sullivan v., xvi. 636	442
Lakefield Lumber and Manufacturing Co. v. Shairp, xix. 657	205
Lakin v. Nuttall, iii. 685	11, 697
Laliberté v. The Queen, i. 117	193, 570, 825
Lamarche, L'Heureux v., xii. 460	2, 674, 678
Lamb v. Cleveland, xix. 78	234, 817
Lambe, The Great Eastern Ry. Co. v., xxi. 431	649
Molson v., xv. 258	481
Lamontagne, Brown v.,	120
Lamoureux v. Molleur	71, 692
Lancashire Ins. Co., Howard v., xi. 92	361, 431
Landers v. Woodworth, ii. 158	479
Lane, McDonald v., vii. 462	753
Langevin, Brassard v., (Charlevoix Election Case), i. 145	248, 695
ii. 319	413
v. Les Commissaires d'Ecole pour la Municipalité de St. Marc, xviii. 599	447, 516
Langlois, Valin v., (Montmorency Election Case), iii. 1	251, 473, 677, 684
(Montmorency Election Case [2]), iii. 90	252
Langtry, Dumoulin v., xiii. 258	671, 751
Lapierre, Champoux v.,	426
L'Union St. Joseph de Montreal v., iv. 164	80
Rodier v., xxi. 69	455

Table of Cases in the Digest.

927

Name of Case and where reported.	Page of Digest.
Laprairie Election Case (Gibeault v. Pelletier), xx. 185.....	273, 665
Larin, Chapman v., iv. 349	133
Larue v. Deslauriers (Bellechasse Election Case), v. 91	255
Larue, Rattray v., xv. 102.....	858
Lasnier, Collette v., xiii. 563	611
La Société Canadienne Française de Construction de Montreal v. Daveluy, xx. 449	104, 349, 453
Lassalle, Bergeron v.,.....	495
L'Association Pharmaceutique de la Province de Quebec v. Brunet xiv. 738 ..	600
L'Assomption Election Case (Gauthier v. Brien), xxi. 29	277, 680
L'Assomption Election Case (Gauthier v. Normandeau), xiv. 429	266
Laumeister, Bowker v., xx. 175.....	856
Laurie, Robertson v., (Shelburne Election Case), xiv. 258	265
Law, The British America Assurance Co. v., xxi. 325	397
Lawless v. Sullivan, iii. 117	47, 684
Lawlor v. Lawlor, x. 194	534
Lawrason, The Trust & Loan Co. v., x. 679	533, 676
Lawrence v. Anderson, xvii. 349	61
Law Society of Upper Canada, MacDougall v., xviii. 203	811
Lawson, Canadian Pacific Ry. Co. v.,	729
Williston v., xix. 678	792
Leacock, Shields v.,.....	604
Lebeau, Portras v., xiv. 742	513
Leclain v. Hosterman	827
Leduc, McGreevy v.,	801
Lees, Stewart v.,	93
Lefebvre v. The Corporation of the City of Quebec,	176
Monette v., xvi. 387	439
Lefrancois, Russell v., viii. 335	679, 871
Leger v. Fournier, xiv. 814	799
Le Maire etc. de Terrebonne v. Les Sœurs etc. de la Providence,	434
Lemay, McRae v., xviii. 280	42
Lenoir v. Ritchie, iii. 575	416, 474
Les Commissaires d'Ecole etc. de St. Gabriel v. Les Sœurs de Notre Dame de Montreal, xii. 45	51
Les Commissaires d'Ecole de St. Marc, Langevin v., xviii. 599	447, 516
Les Curé et Marguilliers de la Paroisse de la Nativité, Bank of Toronto v., xii. 25.....	432, 687
Les Ecclesiastiques de St. Sulpice de Montreal v. The City of Montreal, xvi. 399.....	52, 440, 711
Les Sœurs de Notre Dame de Montreal, Les Commissaires d'Ecole, etc., de St. Gabriel v., xii. 45	51
Les Sœurs & de la Providence, Le Marie, etc., de Terrebonne v.....	434
Letourneux v. Dansereau, xii. 307	347, 677
Lett, St. Lawrence and Ottawa Ry. Co. v., xi. 423.....	732
Levi v. Reed, vi. 482	412
Levis, Corporation of the town of, v. The Queen, xxi. 31	313
Levis Election Case (Belleau v. Dussault), xi. 183.....	265, 686
Levis, Town of, Quebec Warehouse Co. v., xi. 666	726

Name of Case and where reported.	Page of Digest.
Levy v. Halifax and Cape Breton Ry. & Coal Co.....	579
Lewin, J. D. <i>Ex parte</i> , xi. 484	49
Almon v., v. 514	869
v. Howe, xiv. 722	20
Wilson, ix. 687	582
L'Heureux v. Lamaroche, xii. 460.....	2, 674, 678
Liggett, Treacey v., ix. 441	258
Lionais v. The Molson's Bank, x. 596	20, 872
Liquidators of the Bank of P. E. I., Morris v.....	68
Maritime Bank v. The Queen, xvii. 657.....	201, 817
The Receiver General of New Brunswick, xx. 895	79, 204, 884
Maritime Bank v. Troop, xvi. 456	883
Liquor License Act, 1888, <i>In re</i>	509, 679
Lisgar Election Case (Collins v. Ross), xx. 1	270, 663
Little Seminary of Ste. Therese, The Canadian Pacific Ry. Co. v., xvi. 606..	441, 741
Liverpool & London & Globe Ins. Co. v. Wyld, i. 604	353, 676, 825
Livingstone, Farmer v., v. 221.....	487
viii. 140	607
Lloyd, Bickford v.,	35, 673
Logan v. The Commercial Union Ins. Co., xiii. 270	363
London and Canadian Loan Co., Duggan v., xx. 481.....	856
& Agency Co., The Rural Municipality of Morris v., xix. 484	451
& Agency Co. v. Warin, xiv. 232.....	565
London, Corporation of the City of v. Goldsmith, xvi. 231	552
Life Ins. Co. v. Wright, v. 466.....	369
Long v. Hancock, xii. 532	321
Longueuil Navigation Co. v. The City of Montreal, xv. 566.....	483
Lord v. Davidson, xiii. 166	684, 807
Lordly, The City of Halifax v., xx. 505	555
Low v. Gemley, xviii. 685	309
Lucas, Merchants' Bank of Canada v. xviii. 704.....	318
Lunenburg Election Case (Kaulbach v. Eisenhauer), xx. 169	272
Lunenburg, The Warden, etc., of, v. The Atty.-Gen. of N. S., xx. 596	557
L'Union St. Joseph de Montreal v. Lapierre, iv. 164.....	80
Lush v. Waldie (Halton Election Case), xix. 557	28, 270, 682
Lynch v. The Canada N. W. Land Co., xix. 204	484, 554
Seymour, xv. 341	470
Wood.....	783
Lyon, Murray v. (Pontiac Election Case), xx. 626.....	276, 666

M.

Macdougall v. The Law Society of Upper Canada, xviii. 208.....	811
Mackinnon v. Keroack, xv. 111	322
Macklin, Bell v., xv. 576	581, 791
Mader v. McKinnon, xxi. 645	122
Magee, Gilmour v., xviii. 579	467

Table of Cases in the Digest.

929

Name of Case and where reported.	Page of Digest.
Magee, Kane v.,	247
Magnan v. Dugas (Montcalm Election Case), ix. 93	261
Magog Textile & Print Co. v. Dobell, xiv. 664.....	182
Price, xiv. 664	182
Mail Printing Company v. Laflamme.....	493
Maire, Le, etc., de Terrebonne v. Les Sœurs, etc., de la Providence.....	434
Major, Canadian Pacific Ry. Co. v., xiii. 233	736
v. Corporation of Three Rivers.....	422
Manitoba Free Press Co., Ashdown v., xx. 43	492, 578, 647, 664
v. Martin, xxi. 518	493
Manitoba Mortgage Co. v. The Bank of Montreal, xvii. 692.....	602
Manning, Nasmith v., v. 417	166, 695
McDonald v., xix. 112.....	158
Marcheterre, The Ontario & Quebec Ry. Co. v., xvii. 141	444, 700
"Marion Teller, The" (Clarke v. Odette),	521
Maritime Bank of the Dominion of Canada v. Stewart, xx. 105	452
The Liquidators of, v. Receiver General of N. B., xx. 695 ..	79
Marquis, Danjou v., iii. 251	414
Marshall, McRae v., xix. 10	524
v. Municipality of Shelburne, xiv. 737	91
Martin, The Manitoba Free Press Co. v., xxi. 518	493
v. Moore, xviii. 634	448
Morse v.,	839
The Quesu v., xx. 240	202, 710, 818
v. Roy	682
Martley v. Carson, xiii. 439	704
xx 634	757
Mathieu, The Quebec, Montmorency & Charlevoix Ry. Co. v., xix. 426	44, 450
Matthew, Halifax Banking Co. v., xvi. 721	119
May v. McArthur	674, 779
McDougall, xviii. 700	771
Mayor, etc., of Fredericton v. The Queen, iii. 505	590
Montreal v. Hall, xii. 74	511
St. John, Edwards v.,	48
v. MacDonald, xiv. 1	551
McSorley v., vi. 531	45
v. Pattison	173
Sears v., xviii. 702	468
M. C. Upper, The, (McCallum v. Odette), vii. 36	517, 676
Meagher, Power v., xvii. 287	854
Megantic Election Case (Frechette v. Goulet), viii. 169	259, 676
ix. 279	262
Mercer v. The Attorney-General for Ontario, v. 538	477
Merchants Bank of Canada v. Keefer, xiii. 515.....	688, 875
Lucas, xviii. 704	318
McKay, xv. 672	75
Moffatt v., xi. 46	16, 671

Name of Case and where reported.	Page of Digest.
Merchants Bank of Canada v. The Queen	636
Smith, viii. 512	688, 863
Whitfield	681
Halifax v. Gillespie, x. 812	169
McNutt, xi. 126	85
Whidden, xix. 53	9, 77
Despatch Transportation Co. v. Hately, xiv. 572	124
Marine Ins. Co., of Canada, Allen v., xv. 488	393
v. Barnes, xv. 185	393
Boak v., i. 110	411, 677, 825
Butler v.,	390
of Canada, O'Connor v., xvi. 331	394
v. Rumsey, ix. 577	381
Troop v., xiii. 506	392
Mercier, Price v., xviii. 808	659
Miller, Coleman v.,	301, 678, 683
Confederation Life Assoc., of Can., v., xiv. 880	374
v. Duggan, xxi. 88	752
Stephenson, xvi. 722	290
White, xvi. 445	289
Milloy v. Kerr, viii. 474	676, 863
Mills v. Ray (Annapolis Election Case), xx. 169	272
Millville Mut. Mar. & F. Ins. Co. v. Driscoll, xi. 183	385, 401
Minister and Trustees of St. Andrew's Church, Montreal, Johnston v., 1. 235	643
Minnie Morton, The (Owen v. Odette)	519
Mitchell v. Cameron (West Huron Election Case), viii. 126	259
Holland, xvi. 687	853
Mitchell, xvi. 722	308
Mockler, McGowan v.,	421
Moffatt, Burland v., xi. 76	59
v. The Merchants' Bank of Canada, xi. 46	16, 671
Moir v. The Corporation of the Village of Huntingdon, xix. 363	189, 449
Sovereign Fire Ins. Co. v., xiv. 612	364
Molleur, Lamoureux v.,	71, 692
Molson, Barnard v., xv. 716	811
v. Barnard, xviii. 622	417
v. Lambe, xv. 258	481
Molson's Bank v. Halter, xviii. 88	62
Lionais v., x. 526	20, 872
Thompson v., xvi. 664	76
Monaghan v. Horn, (The Garland), vii. 409	518
Monette v. Lefebvre, xvi. 887	439
Montague, Walsh v. (Haldimand Election Case), xv. 495	268
Montcalm Election Case, (Magnan v. Dugas), ix. 98	261
Montmagny Election Case, (Choquette v. Laberge), xv. 1	267
Montmorency Election Case, (Valin v. Langlois), iii. 1	251, 473, 677, 684
iii. 90	252
Montreal, City of, Atty.-Genl. of Canada v., xiii. 352	50, 674
Bain v., viii. 252	46

Table of Cases in the Digest.

931

Name of Case and where reported.	Page of Digest.
Montreal, City of, v. Labelle, xiv. 741	222
<i>Les Ecclesiastiques, etc. v., xvi. 899</i>	52, 440, 711
<i>Longueuil Navigation Co. v., xv. 566</i>	482
<i>Wylie v., xii. 384</i>	50
Montreal City Passenger Ry. Co., Parker v.	674, 683, 686, 731
<i>v. Hall, xii. 74</i>	511, 680
<i>Loan & Mortgage Co. v. Fauteux, iii. 411</i>	20, 797
<i>Ottawa & W. Ry. Co., County of Ottawa v., xiv. 198</i>	221
<i>Street Ry. v. Ritchie, xvi. 622</i>	518
<i>Telegraph Co., The Great Western Telegraph Co. v., xx. 170</i>	472
<i>v. Wylie, xii. 384</i>	
Moody v. Jones, xix. 266	5, 159, 710
Mooney v. McIntosh, xiv. 740	95
Moore v. The Connecticut Mut. Life Ins. Co., vi. 634	419, 695
<i>Martin v., xviii. 634</i>	448
Moran, Taylor v., xi. 347	391
Morden, The Rural Municipality of South Dufferin v., xix. 204	484, 554
Morgan, Cote v., vii. 1	676, 712
Morin, Dupont v., (Bagot Election Case), xxi. 28	276
<i>v. The Queen, xviii. 407</i>	198
<i>v. The Queen, xx. 515</i>	203, 748
Morris, The Connecticut & Passumpsic Rivers Railroad Co. v., xiv. 318	300
<i>v. Liquidators' Bank, P.E.I.</i>	68
<i>The Rural Municipality of, v. The London & Can. Loan & Agency Co., xix. 484</i>	451
Morrison, Christie v., (Argenteuil Election Case), xx. 194	274, 665
<i>Kandick v., ii. 12</i>	413
<i>v. McCuaig</i>	642
Morrow, Waterous v.,	138
Morse v. Martin	839
Morton, Grank Trunk Ry. Co. v.,	732
Moss, The Eureka Woollen Mills Co. v., xi. 91	431, 575
Mott v. The Bank of Nova Scotia, xiv. 650	882
<i>Fielding v., xiv. 254</i>	528
<i>Stuart v., xiv. 784</i>	600
Mousseau (Atty.-General), Reed v., viii. 408	478
Mowat v. McFee, v. 66	590
Moxley, Canada Atlantic Ry. Co. v., xv. 145	738
Muir v. Carter, xvi. 473	407, 694, 853
Muirhead v. Shireff	684
Muirhead v. Shirreff, xiv. 735	21
Mullin v. Hoe	219
Mulock, Patterson v., (North York Election Case)	682
Municipality of the County of Cape Breton, Crewe—Read v.—xiv. 8	527
<i>v. McKay, xviii. 639</i>	533, 817
Municipality of North Dufferin, Bernardin v., xix. 581	160, 186, 555
<i>Shelburne, Marshall v., xiv. 737</i>	91
Munn v. Berger, x. 512	763
Murdoch, Chesley v., ii. 48	283

Name of Case and where reported.	Page of Digest.
Murphy, The Kingston & Pembroke Ry. Co. v., xvii. 582	744
The Queen v.	314
Murray, Canada Central Railway Co. v., viii. 813.....	13
v. Lyon, (Pontiac Election Case), xx. 626.....	276, 666
Warner v., xvi. 720.....	334
Mutual Fire Ins. Co. of the County of Wellington v. Frey, v. 82	356
Relief Society of N. S., Fitzrandolph v., xvii. 333	376
v. Webster, xvi. 718.....	376
McAllister v. Forsyth, xii. 1	116
McArthur v. Brown, xvii. 61	281
May, v.,	674, 779
Stephens v., xix. 446	63
McBain, Blachford v., xix. 42	448
v., xx. 269	666
McCaffrey, Ball v., xx. 319	282, 453
McCall v. McDonald, xiii. 247	118
v. Wolf	673
xiii. 180	117
McCallum v. Odette (The M. C. Upper), vii. 36	517, 676
McCarron, McGreevy v.,	144
v. McGreevy, xiii. 378	151
McColl, Tupper v. (Pictou Election Case), xx. 169	272
McConaghy v. Denmark, iv. 609	504
McCord, Wadsworth v., xii. 466	237
McCorkill v. Knight, iii. 233.....	585, 694
McCrae v. White, ix. 22.....	342
McCraken v. McIntyre, i. 479	163
McCuaig v. Keith (The Pictou), iv. 648.....	19, 517
Morrison v.,	642
McDonald v. Abbott, iii. 278	414, 696
v. Cameron (Inverness Election Case), xx. 169	272
City of St. John v., xiv. 1.....	551
v. Crombie, xi. 107	320
Dawson v.,	586, 683
v. Doull	384
Forristal v., ix. 12	422, 696, 763
v. The Georgian Bay Lumber Co., ii. 364	339
Gibbons v., xx. 587.....	64, 707
v. Gilbert, xvi. 700	24, 290
v. Lane, vii. 462	753
v. Manning, xix. 112	153
Mayor, etc., of St. John v., xiv. 1	551
McCall v., xiii. 247	118
v. McDonald, xxi. 201	857
v. McPherson, xii. 416	82
Worthington v., ix. 327	594
McDonnell v. McMaster	246
McDougall v. Cameron, xxi. 379.....	66, 190, 457
v. Campbell, vi. 502	592

Table of Cases in the Digest.

933

Name of Case and where reported.	Page of Digest.
McDougall, Gendron v.	429
May v., xviii. 700	771
MacDougall v. The Law Society of Upper Canada, xviii. 203.	811
McDougall, Smyth v., i. 114	288
McFadden, Hall v.	723
McFarlane, Parish of St. Cesaire v., xiv. 738	182
Peterkin v., xiii. 677	535
The Queen v., vii. 216	630
v. The Queen, xvi. 393	197
Raphael v., xviii. 183	854
McFee, Mowat v., v. 66	590
McGhee, Phoenix Ins. Co. v., xviii. 61	25, 895
McGillevey, Corporation of the Town of Hialop v., xv. 188	672
McGillivray, Corporation of the Town of Hialop v., xvii. 479	338
Thompson v. (Antigonish Election Case), xx. 169	272
McGowan v. Mockler	421
McGreevy v. Boomer	189
Guilbault v., xviii. 609	156
v. Leduc	801
v. McCarron	144
McCarron v., xiii. 378	151
v. Paillé	141
v. The Queen, xiv. 735 ..	21
The Queen v., xviii. 371	155
v. The Queen, xix. 180	48
McGregor v. The Canada Investment & Agency Co., xxi. 499.	881
Esson v., xx. 176	88
McGugan v. McGugan, xxi. 267	66, 190, 456
v. Smith, xxi. 263	813
McGuire, Birkett v.,	598
McIlreith, Doull v., xiv. 739	22
McIntosh, Mooney v., xiv. 740	95
McIntyre v. Hood, ix. 556	775
McCraken v., i. 479	163
McKay, Churchill v., (Re Ship "Quebec"), xx. 472	655
v. Chrysler, iii. 486	47
v. Glen (South Ontario Election Case), iii. 641	252
The Merchants' Bank of Canada v., xv. 672	75
The Municipality of the County of Cape Breton v., xviii. 639	553, 817
McKean v. Jones, xix. 489.	662
McKenna v. McNamee, xv. 311	152
McKenzie v. Champion, xii. 649	784
v. Corbett	384
v. Kittridge, iv. 368	165, 684
Shaw v., vi. 181	108
McKercher v. Sanderson, xv. 296	790
McKinlay, Fitzgerald v.,	107
McKinnon v. Keroack, xv. 111.	322, 437
McKinnon, Mader v., xxi. 645	122

Name of Case and where reported.	Page of Digest.
McLachlan, The Accident Ins. Co. of North America v., xviii. 627	448
McLaren, Archibald v., xxi. 588	514
v. Caldwell, viii. 485	821
McLean v. Bradley, ii. 585	164
v. Garland, xiii. 866	320
v. Hannon, iii. 706	850
The Queen v.,	399
viii. 210	631
Sea v., xiv. 632	789
Smith v., xxi. 355	121
v. Wilkins, xiv. 22	541
McLellan v. The North British and Mercantile Ins. Co., xxi. 288.....	367
McLennan v. Chisholm (Glengarry Election Case), xx. 38	272, 668
Grange v., ix. 385.....	774
McLeod v. The New Brunswick Railway Co., v. 281	12, 676
The Queen v., viii. 1	630
McManamy, The Corporation of the City of Sherbrooke v., xviii. 594	446
McMaster, McDonnell v.,	246
McMicken v. The Ontario Bank, xx. 548	297, 546
McMillan, Barton v., xx. 404	813, 820
Byers v., xv. 194	17
The Grand Trunk Ry. Co. of Canada v., xvi. 543	153, 657, 740
v. Hedge, xiv. 786.....	795
The South-West Boom Co. v., iii. 700	645
v. Valois (Vaudreuil Election Case), xxii. 1	460
Walker v., vi. 241.....	135
McNab v. Wagler.....	699
McNamee, Fulton v., ii. 470	403
McKenna v., xv. 311	152
McNutt, Merchants' Bank of Halifax v., xi. 126.....	85
McPherson, McDonald v., xii. 416	82
McQueen v. The Phoenix Mutual Fire Insurance Co., iv. 660.....	356, 688
v. The Queen, xvi. 1	229, 280, 505, 516, 641, 852
McRae v. Lemay, xviii. 280	42
v. Marshall, xix. 10	524
McSorley v. The Mayor, etc., of St. John, vi. 531	45
McWillie, The North Shore Ry. Co. v., xvii. 511	744

N.

Nasmith v. Manning, v. 417.....	166, 695
Neelon, Beatty v., xiii. 1	181
Canadian Pacific Ry. Co. v.,	522
Neill v. Travellers' Ins. Co., xii. 55	373
Neilson, Snowball v., xvi. 719	407
Nelles, White v., xi. 587	650
Nevins, The Queen v.,	427
New Brunswick Ry. Co., McLeod v., v. 281.....	12, 676
v. Robinson, xi. 688.....	726

Table of Cases in the Digest.

935

Name of Case and where reported.	Page of Digest.
New Brunswick Ry. Co. v. Vanwart, xvii. 85	748
New Westminster, Corporation of the City of v. Brighthouse, xx. 520	556
New York Life Ins. Co., The, Vezina v., vi. 80	370
Nicholls v. Cumming, i. 395	45
Nicholson, Temple v.,	114
Nordheimer v. Alexander, xix. 248	568
Normand, Beausoleil v., ix. 711	18
Normand, Chagnon v., xvi. 661	442
Normandeau, Gauthier v., (L'Assomption Election Case), xiv. 429	266
North America Life Ass. Co. v. Craigen, xiii. 278	374
British & Mercantile Ins. Co. v. McLellan, xxi. 288	367
Dufferin, The Municipality of, Bernardin v., xix. 581	160, 186, 555
Northern Ass. Co., Hobbs v., xii. 681	362
North Ontario Election Case, (Wheeler v. Gibbs), iii. 374	253, 416
(Wheeler v. Gibbs), iv., 490	254
Perth Election Case, (Campbell y. Grieve), xx. 331	274
Shore Ry. Co., Beaudet v., xv. 44	40
Bigaouette v., xvii. 363	311
v. McWillie, xvii. 511	744
Pion v., xiv. 677	756
v. Trudel	798
v. Ursulines of Quebec	86
North-West Transportation Co., Beatty v., xii. 598	181
North York Election Case, (Patterson v. Mulock)	682
Norvell, Canada Southern Ry. Co. v.,	34, 673
Nova Scotia Central Ry. Co. v. The Halifax Banking Co., xxi. 536	749
Nuttall, Lakin v., iii. 685	11, 697

O.

Oakes v. The City of Halifax, iv. 640	38
Kearney v., xviii. 148	312, 582
O'Brien v. Caron (Quebec County Election Case), xiv. 429	266
v. Cogswell, xvii. 420	53, 508
v. O'Brien	297
v. The Queen, iv. 529	620, 686
ex rel. Felitz, xvi. 197	133, 439
Ocean Mut. Mar. Ins. Co., Bailey v., xix. 163	396
Spinney v., xvii. 326	395
O'Connor v. The Merchants' Marine Ins. Co., xvi. 331	394
Odette, Clarke v. ("The Marion Teller")	521
McCallum v. ("The M. C. Upper"), vii. 36	517, 676
Owen v. ("The Minnie Morton")	519
O'Donnell, Confederation Life Ass. of Canada v.,	370
x. 92	371
xiii. 318	372
xvi. 717	373
O'Donohoe v. Beatty, xix. 356	27, 449, 812
Heward v., xix. 341	507, 654

Name of Case and where reported.	Page of Digest.
O'Donohoe, <i>Stammers v.</i> , xi. 358.....	782
Ogden, <i>Dawson v.</i> ,	797
Oille, <i>Beatty v.</i> , xii. 706.....	575
O'Keefe <i>v. Curran</i> , xvii. 596.....	601
Oliver <i>v. Davidson</i> , xi. 166	874
<i>v. Johnston</i>	651
<i>Vernon v.</i> , xi. 156.....	38, 683
O'Meara <i>v. The City of Ottawa</i> , xiv. 742	498
Ontario Bank <i>v. Chaplin</i> , xx. 152	29, 79, 348, 672, 684
<i>McMicken v.</i> , xx. 548	297, 546
<i>v. Stewart</i>	571
<i>Car Co. v. Farwell</i> , xviii. 1	745
<i>Coal Co., The Western Ass. Co. v.</i> , xxi. 383	398
<i>Loan and Debenture Co., Hobbs v.</i> , xviii. 483.....	544
<i>North, Election Case (Wheeler v. Gibbs)</i> , iii. 374.....	253, 416
iv. 430	254
<i>& Quebec Ry. Co. v. Marcheterre</i> , xvii. 141.....	444, 700
<i>v. Philbrick</i> , xii. 288	188, 687, 688
<i>South, Election Case (McKay v. Glen)</i> , iii. 641	252
O'Regan <i>v. Peters</i> , xvii. 44	483, 815
Osborne <i>v. Henderson</i> , xviii. 698.....	603
O'Shaughnessy <i>v. Ball</i> , xxi. 415	755
O'Sullivan <i>v. Harty</i> , xi. 322.....	308
xiii. 431	703
<i>Lake</i> , xvi. 636	442
O'Toole, <i>Wallace v.</i> ,	713
Ottawa, Corporation of the City of, <i>The Canada Atlantic Ry. Co. v.</i> xii. 365..	550
County of, <i>v. The Montreal, Ottawa & Western</i>	
<i>Ry. Co.</i> , xiv. 193	221
<i>Agricultural Ins. Co. v. Sheridan</i> , v. 157	358
<i>City of, O'Meara v.</i> , xiv. 742..	498
Owen <i>v. Odette ("The Minnie Morton")</i>	519
Owens <i>v. Bedell</i> , xix. 137	823

P.

Page <i>v. Austin</i> , x. 182 ..	169
Paillé, <i>McGreedy v.</i> , ..	141
Paint <i>v. The Queen</i> , xviii. 718.....	312
Palmer <i>v. Wallbridge</i> , xv. 650	471
Palmerston, Corporation of the Town of, <i>The Waterous Engine Works Co.</i>	
<i>v.</i> , xxi. 556	562
Paradis <i>v. Bossé</i> , xxi. 419	66, 190
<i>Bruneau (Richelieu Election Case)</i> , xxi. 168	277
<i>The Queen</i> , v., xvi. 716.....	41
Parish of St. Cessaire <i>v. McFarlane</i> , xiv. 738	182
Parkdale, <i>West v.</i> , xii. 250	550
Parker <i>v. Montreal City Passenger Ry. Co.</i>	674, 683, 686, 731
<i>White v.</i> , xvi. 699.....	4

Table of Cases in the Digest.

937

Name of Case and where reported.	Page of Digest.
Parsons, The Citizens Ins. Co. v., iv. 215	476
The Queen Ins. Co. v., iv. 215	476, 695
v. The Standard Fire Ins. Co., v. 233	357
Partlo v. Todd, xvii. 196	841
Patch v. Pitman	389
Patterson, Campbell v., xxi. 645	122
v. Mulock (North York Election Case)	682
Pattison, Mayor, etc., of St. John v.,	173
Peak, Shields v., viii. 579	341, 417, 676
Pearson, Sherren v., xiv. 581	503
Peck v. Powell, xi. 494	609
Peers v. Elliott, xxi. 19	530
Pelletier, Gibeault v., (Laprairie Election Case), xx. 185	278, 665
Penman Manufacturing Co. v. Broadhead, xxi. 713	18
Penrose v. Knight	689, 776
People's Bank, The Exchange Bank of Canada v.,	79
of Halifax v. Johnson, xx. 541	161
People's Loan & Deposit Co. v. Grant, xviii. 262	400
National Bank of Charleston, Stewart v.,	81
Perkins, Bank of Toronto v. viii. 603	67
Perrault, Cimon v. (Charlevoix Election Case), v. 133	256
Perrault, Reeves v., x. 616	335
Perry v. Cameron (Prince County P. E. I. Election Case), xx. 26	271, 663
Hackett v. (Prince County P. E. I. Election Case), xiv. 265	265
Standly v., iii. 356	4
Perth, County of, <i>In re</i> Canada Temperance Act, 1878	105, 679
Peterborough, Corporation of County of, Corporation of County of Victoria v.,	558
The Grand Junction Ry. Co. v., viii. 76	101
Peterkin v. McFarlane, xiii. 677	535
Rose v., xiii. 677	535
Peters v. City of St. John, xxi. 674	56
Danaher v., xvii. 44	483, 815
v. Hamilton	763
O'Regan v., xvii. 44	483, 815
v. The Quebec Harbour Commissioners, xix. 685	160
Sovereign Fire Ins. Co., of Canada, v., xii. 33	362
Petrie v. Guelph Lumber Co., xi. 450	178
Petry v. La Caisse d'Economie de Notre Dame de Quebec, xix. 713	855
Phelps, Canada Southern Ry. Co. v., xiv. 132	725
Philbrick, Ontario & Quebec Ry. Co. v., xii. 288	188, 687, 688
Phoenix Ins. Co. v. McGhee, xviii. 61	25, 395
Mut. Life Ins. Co., Boyce v., xiv. 723	375
Ins. Co., McQueen v., iv. 660	356, 688
Piché v. The City of Quebec	497
Picton, The, (McCuaig v. Keith), iv. 648	19, 517
Bank v. Harvey, xiv. 617	770
Election Case, (Tupper v. McColl), xx. 169	272
School Trustees v. Cameron, ii. 690	166
Pigeon v. The Recorder's Court and the City of Montreal, xvii. 495	483
Piggott, Kennedy v., xviii. 699	42
Pilon v. Brunet, v. 318	125, 680

Name of Case and where reported.	Page of Digest.
Pinsonneault, Browne v., iii. 102	469
Pinsonneault v. Hebert, xiii. 450	654
Pion v. The North Shore Ry. Co., xiv. 677	756
Pitman, Patch v.,	389
Platt, Attrill v., x. 425	240
Plumb v. Steinhoff, xiv. 739	95
Poirier v. Brulé, xx. 97	855
Poitras v. Lebeau, xiv. 742	513
Poitvin, <i>In re</i>	327
Pontiac, The Corporation of the County of, v. Ross, xvii. 406	743
Pontiac Election Case (Murray v. Lyon), xx. 626	276, 666
Portage Extension of the Red River Valley Railway, <i>In re</i>	487
Portland, City of, Williams v., xix. 159	554
Portland, Town of, v. Griffiths, xi. 333	177
Poulin v. The Corporation of Quebec, ix. 185	479
Pouliot, Fraser v., iv. 515	228
Powell, Peck v., xi. 494	609
Power v. Ellis, vi. 1	885
v. Meagher, xvii. 287	854
Preeper v. The Queen, xv. 401	196
Prefontaine, Dufresne v., xxi. 607	101
Vallée v., xxi. 607	101
Prescott Election Case (Proulx v. Fraser), xx. 196	274, 665
Prevost, Turner v., xvii. 283	819
Price, Magog Textile & Print Co. v., xiv. 664	182
v. Mercier, xviii. 303	659
Prince County, P. E. I., Election Case (Hackett v. Perry), xiv. 265	265
(Perry v. Cameron), xx. 26	271, 663
Prince, Gagnon v., vii. 386	285
Proulx v. Fraser (Prescott Election Case), xx. 196	274, 665
Providence Washington Ins. Co. v. Almon	390
v. Chapman	386
v. Corbett, ix. 256	383
v. Gerow, xiv. 731	392, 675
xvii. 387	395
Provincial Ins. Co. of Canada, Billington v., iii. 182	359
v. Connolly, v. 258	379
Pugh, Robertson v., xv. 706	393
Pugsley v. Ring	241
Pun Pong, Hett v., xviii. 290	812
Purcell v. Kennedy (Glengarry Election Case), xiv. 453	266
Purdom v. Baechler, xv. 610	600
Putnam, Hardnam v., xviii. 714	660

Q.

Quebec Central Ry. Co., The, The Corporation of the City of Quebec v., x. 563 ..	721, 819
City of, The Bell Telephone Co. of Canada v., xx. 230	452
Piché v.	497
The Quebec Gas Co. v. xx. 230	452
Corporation of The City of, Lefebvre v.	176
Poulin v., ix. 185	479
The Quebec Central Ry. Co. v., x. 563	721

Table of Cases in the Digest.

939

Name of Case and where reported.	Page of Digest.
Quebec, Corporation of the City of, The Quebec Street Ry. Co. v., xv. 164.....	184
v. Queen	640
County Election Case (O'Brien v. Caron), xiv. 429	266
Gas Co. v. The City of Quebec, xx. 230.....	452
Harbour Commissioners, Peters v., xix. 685.....	160
Montmorency and Charlevoix Ry. Co. v. Mathieu, xix. 426	44, 450
North Shore Turnpike Road Trustees v. Vezina	758
Street Ry. Co. v. The Corporation of the City of Quebec, xv. 164	184
Warehouse Co., The, v. Town of Levis, xi. 666.....	726
Queddy River Driving Boom Co. v. Davidson, x. 222	478
Queen, The, Abrahams v., vi. 10	192
Amer v., ii. 592	413
Arpin v., xiv. 736	21
v. The Bank of Nova Scotia, xi. 1.....	199
v. Beaulieu, xvi. 716	41
v. Belleau, vii. 53	625
Berlinguet v. xiii. 26.....	150, 685
v. Boucher	325
Brisbois v., xv. 421.....	197
Burroughs v., xx. 420	203, 509
Carter, Macy & Co. v., xviii. 706	207
v. Charland, xvi. 721.....	41
v. Chealey, xvi. 306	288
Chevrier v., iv. 1	229, 231, 621
v. Clark, xxi. 656	459
Corporation of the City of Quebec v.,	640
Town of Levis v., xxi. 31	313
Cunningham v.,	194
v. Dartmouth, 9, 509.....	515
v. Doutre, vi. 342.....	623
Downie v., xv. 358.....	195
v. Dunn, xi. 385.....	639
Ellis v., xxii. 7.....	133, 458
v. Farwell, xiv. 392	715
Grant v., xx. 297	203, 675
Grinnell v., xvi. 119	207, 815
Guay v., xvii. 30.....	311
The Halifax City Ry. Co. v.,	37, 679
v. Hubert, xiv. 737.....	39
Humphrey v., xx. 591	161, 204
Isbester v., vi. 696	628
Jacobs v., xvi. 433	197
John v., xv. 384	196
Jones v., vii. 570	618
Kearney v.,	313
Kenny v.,	636
Laliberté v., i. 117.....	193, 570, 825
Liquidators of the Maritime Bank v., xvii. 637	201, 817
v. Martin, xx. 240	202, 710, 818
Mayor, etc., of Fredericton v., iii. 505	590
v. McFarlane, vii. 216	630
McFarlane v., xvi. 393.....	197
v. McGreevy, xiv. 735	21

Name of Case and where reported.	Page of Digest.
Queen, The, v. McGreevy, xviii. 371	155
McGreevy v., xix. 130	43
v. MacLean	399
viii. 210	631
v. McLeod, viii. 1	630
McQueen v., xvi. 1	229, 280, 505, 516, 641, 852
The Merchants' Bank of Canada v.,	636
Morin v., xx. 515	203, 748
xviii. 407	198
v. Murphy	314
v. Nevins	427
O'Brien v., iv. 529	620, 686
ex rel. Felitz, O'Brien v., xvi. 197	133, 439
Paint v., xviii. 718	312
v. Paradis, xvi. 716	41
Preeper v., xv. 401	196
Quirt v., xix. 510	202, 591
v. Robertson, vi. 52	622
The St. Catharines Milling and Lumber Co. v., xiii. 577	337
v. The St. John Water Commissions, xix. 125	158
Scott v., ii. 349	193, 681
Queen, The, Severn v., ii. 70	474
v. Smith, x. 1	632
.....	634
v. Starrs, xvii. 118	154, 678
v. Taylor, i. 65	411, 826
Theal v., vii. 397	192
v. Trepanier, xii. 111	328
Tylee v., vii. 651	625
Vezina v., xvii. 1	311
v. The Warden, etc., of Dartmouth, ix. 509	515
The Warden, etc., of Dartmouth v., xiv. 45	515
& the Western Counties Ry. Co., The Windsor & Annapolis Ry. Co. v., x. 335	633, 683
Wood v., vii. 631	696
vii. 634	629
Queen Insurance Co. v. Parsons, iv. 215	476, 678, 695
Queen's County, P. E. I., Election Case (Davies v. Hennessy), xx. 26	271, 663
(Jenkins v. Brecken), vii. 247	256
Quirk, Thomson v., xviii. 695	119
Quirt v. The Queen, xix. 510	202, 591

R.

Radenhurst, Draper v., xxi. 714	836
Raleigh, Corporation of the Township of, Dillon v., xiv. 739	183
Williams v., xxi. 103	560
Ramsay, Reid v.,	420
Rand, Chapman v., xi. 312	108
Rankin, Roblee v., xi. 137	84, 428
Raphael v. McFarlane, xviii. 183	854
Rattó, Booth v., xxi. 637	667
Rattray v. Larue, xv. 102	858

Table of Cases in the Digest.

941

Name of Case and where reported.	Page of Digest.
Rattray v. Young	149, 692
Ray v. The Annual Conference of New Brunswick, vi. 308	870
Mills v. (Annapolis Election Case), xx. 169	272
Reburn v. La Corporation de la Paroisse de Ste. Anne du Bout de l'Isle, xv. 92.	183
Receiver-General of New Brunswick, The Liquidators of the Maritime Bank v., xx. 695	79, 204, 884
Recorder's Court and The City of Montreal, Pigeon v., xvii. 495	483
Rector, etc., of St. George's Parish, Parrsboro', The, v. King, ii. 143	32
Red River & Assiniboine Bridge Co., Rolston v.,	564
Reed, Levi v., vi. 482	412
v. Mousseau (Attorney-General), viii. 408	478
Reeves v. Gerriken	689
v. Perrault, x. 616	335
Reid v. Ramsay	420
Rennie, The Utterson Lumber Co. v., xxi. 218	860
Reynolds v. Barned's Banking Co.	170
Richardson, Vaughan v., xvii. 703	445, 694, 700, 706
xxi. 359	809
Richelieu Election Case (Paradis v. Bruneau), xxi. 168	277
Navigation Co., Dixon v., xviii. 704	109
Richford, Gray v., ii. 431	866
Rickaby v. Bell, ii. 560	339
Rider v. Snow (Stanstead Election Case), xx. 12	271, 296, 410, 693, 754
Ring, Pugsley v.,	241
Ritchie, Diocesan Synod of N. S. v., xviii. 705	233
Lenoir v., iii. 575	416, 474
The Montreal Street Ry. Co. v., xvi. 622	513
Snowball v., xiv. 741	96
Roberts v. Vaughan, xi. 273	84
Robertson v. Laurie (Shelburne Election Case), xiv. 258	265
Robertson v. Pugh, xv. 706	393
The Queen v., vi. 52	622
v. Wigle, (The St. Magnus), xv. 214	22
v. Wigle, (The St. Magnus), xvi. 720	520
Robillard, Caverhill v., ii. 575	584
Robinson, Canadian Pacific Ry. Co. v., xiv. 105	222
v., xix. 292	5, 661, 710
Harris v., xxi. 390	813
New Brunswick Ry. Co. v., xi. 688	726
Roblee v. Rankin, xi. 137	84, 428
Rodburn v. Swinney, xvi. 297	543
Rodier v. Lapierre, xxi. 69	455
Rogers v. Duncan, xviii. 710	243
Rolston v. Red River & Assiniboine Bridge Co.	564
Rooney, Schroeder v.,	403, 434
Rose v. Hickey	534
v. Peterkin, xiii. 677	535
Rosenberger, The Grand Trunk Ry. Co. v., ix. 311	720
Ross v. Barry, xix. 360	295
Collins v., (Lisgar Election Case), xx. 1	270, 663
The Corporation of the County of Pontiac v., xvii. 406	743
Doran v.,	829
v. Hannan, xix. 227	773

Name of Case and where reported.	Page of Digest.
Ross, Holland v., xix. 566	205
v. Hunter, vii. 289	843
v. Hurteau, xviii. 713	772
v. Laird	351
v. Ross	306
Rothery, German v., (Welland Election Case), xx. 376	275
Rouville Election Case, (Brodeur v. Charbonneau), xxi. 28	276
Roy, Corporation of Aubert-Gallion v., xxi. 456	837
Martin v.,	682
Royal Canadian Ins. Co., Gerow v., xvi. 524	394
Smith v.,	385
Royal Ins. Co. v. Duffus, xviii. 711	293
Rumsey, The Merchants' Marine Ins. Co. v., ix. 577	381
Rural Municipality of Cornwallis v. The Canadian Pacific Ry. Co., xix. 702	54
Morris v. The London & Canadian Loan & Agency Co., xix. 434	451
South Dufferin v. Morden, xix. 204	484, 554
Russell v. Lefrancois, viii. 335	679, 871
Ruttan, Trust and Loan Co. v., i. 564	228, 688
Ryan, Clarkson v., xvii. 251	61, 445, 483
Darling v.,	435
v. Ryan, v. 387	19, 828
Whelan v., xx. 65	54
Rykert, St. John v., x. 278	399, 613

S.

Samo, Gore District Mutual Fire Ins. Co. v., ii. 411	355
Sanderson, McKercher v., xv. 296	790
Sangster, Hood v., xvi. 723	444
Scammell v. James, xvi. 593	441
Scanlan, Western Ass. Co. v., xiii. 207	391, 681
Schofield, Carvill v., ix. 370	805
School Commissioners for the municipality of Ste. Victoire, Hus v., xix. 477	245
cf St. Valentine, Tremblay v., xii. 546	244
Schroeder v. Rooney	403, 434
Schultz v. Wood, vi. 585	669, 775
Schwersenski v. Vineberg, xix. 243	294, 661
Scoble, Sinnott v., xi. 571	831
Soott v. The Bank of New Brunswick, xxi. 30	578
Benedict, xiv. 735	790
The Queen, ii. 349	193, 681
Scottish Canadian Asbestos Co. <i>In re</i> (Allen v. Hanson), xviii. 667	883
Imperial Ins. Co., Clark v., iv. 192	358, 688
Union & National Ins. Co., Barrington v., xviii. 615	447
Scribner, Kinloch v., xiv. 77	770
Sea v. McLean, xiv. 632	789
Seaman, West v.,	388
Sears v. The Mayor, etc., of the City of St. John, xviii. 702	468
Seath v. Hagar, xviii. 715	448
Seeton v. King, xviii. 712	294
Selkirk Election Case (Young v. Smith), iv. 494	254

Table of Cases in the Digest.

943

Name of Case and where reported.	Page of Digest.
Severn v. Aroher.....	875
The Queen, ii. 70.....	474
Sewell v. British Columbia Towing Co. (The Thrasher Case).....	480, 670, 675
ix. 527.....	806
Seymour, Lynch v., xv. 341.....	470
Shairp, Lakefield Lumber & Manufacturing Co. v., xix. 657.....	205
Shanly v. Fitzrandolph.....	279
Shannon The Hastings Mutual Fire Ins. Co. v., ii. 394.....	355
Shaw v. Cadwell, xvii. 357.....	601
The Canadian Pacific Ry. Co., xvi. 703.....	407, 443
McKenzie, vi. 181.....	108
St. Louis, viii. 385.....	418
Shelburne Election Case (Robertson v. Laurie), xiv. 258.....	265
(White v. Greenwood), xx. 169.....	272
Shelburne, Municipality of, Marshall v., xiv. 737.....	91
Sherbrooke, Corporation of the city of, v. McManamy, xviii. 594.....	446
Sheridan, The Ottawa Agricultural Ins. Co. v., v. 157.....	358
Sherren v. Pearson, xiv. 581.....	505
Shields v. Leacock.....	604
Peak, viii. 579.....	341, 417, 676
Ship "Quebec" (Churchill v. McKay), xx. 472.....	655
Shirreff, Muirhead v.....	684
xiv. 735.....	21
Shirreff, Swim v.....	142
Shoolbred v. Clarke (Re Union Fire Ins. Co.), xvii. 265.....	658, 883
The Union Fire Ins. Co., xiv. 624.....	882
Shorey v. Jones, xv. 898.....	60
Shortreed, Bew v.,.....	500
Sibbald, The Grand Trunk Ry. Co. of Canada v., xx. 259.....	748
Silver, The Dominion Telegraph Co. v., x. 238.....	489
Simonds v. Chesley, xx. 174.....	850
Sinnott v. Scoble, xi. 571.....	831
Skelton, Evans v., xvi. 637.....	466
Slater v. Badenach, x. 296.....	58, 319
Smart, <i>In re</i> , xvi. 396.....	331, 440
Smith v. The Bank of Nova Scotia, viii. 558.....	167
City of London Fire Ins. Co. v., xv. 69.....	364
v. Goldie, ix. 46.....	608, 689
The Halifax Banking Co. v., xviii. 710.....	293
Hawkins v. (Bothwell Election Case), viii. 676.....	259, 686
McGugan v., xxi. 263.....	813
v. McLean, xxi. 355.....	121
The Merchants' Bank of Canada v., viii. 512.....	688, 863
The Queen v., x. 1.....	632
v. The Royal Canadian Ins. Co.....	634
Wiley v., ii. 1.....	385
Young v., (Selkirk Election Case), iv. 494.....	821
Smyth v. McDougall, i. 114.....	254
Snow, Rider v., (Stanstead Election Case), xx. 12.....	283
Snowball v. Neilson, xvi. 719.....	271, 296, 410, 693, 754
v. Ritchie, xiv. 741.....	407
v. Stewart.....	96
	570

Name of Case and where reported.	Page of Digest.
Seurs, les, de L'Asile de la Providence, le Maire, etc., de Terrebonne v.,	434
Seurs, les, etc., de Notre Dame de Montreal, Corporation de St. Gabriel v., xii. 45.	51
Sombra, The Corporation of the Township of, v. The Corporation of the Township of Chatham, xxi. 305.	561
Somerville v. Laflamme, (Jacques Cartier Election Case), ii. 216.	249, 284
Soulanges Election Case, (Chollette v. Bain), x. 632.	264
(Filiatrault v. DeBeaujeu).	676, 682
South Dufferin, Rural Municipality of, v. Morden, xix. 204.	484, 554
Norwich, Township of, Huson v., xxi. 669.	562
Ontario Election Case, (McKay v. Glen), iii. 641.	232
Souther, Wallace v., ii. 593.	284, 672, 682
xvi. 717.	86
Southwest Boom Co. v. McMillan, iii. 700.	645
Sovereign Fire Ins. Co. of Canada v. Moir, xiv. 612.	364
v. Peters, xii. 33.	362
Spears v. Walker, xi. 113.	145
Spinney v. The Ocean Mutual Marine Ins. Co., xvii. 326.	395
Springer v. The Exchange Bank of Canada, xiv. 716.	75
Sproule, <i>In re</i> , xii. 140.	329
Spurr v. The Albert Mining Co., ix. 35.	136
Stadacona Fire & Life Ins. Co., Caldwell v., xi. 212.	360
Coté v., vi. 193.	167, 682, 683
Stammers, O'Donohoe v., xi. 338.	782
Standard Fire Ins. Co., (Castou's Case), xii. 644.	180
Parsons v., v. 33.	357
Standly v. Perry, iii. 356.	4
Stanstead Election Case, (Rider v. Snow), xx. 12.	271, 296, 410, 693, 754
Stanton v. The Canada Atlantic Ry. Co.	430
Starrs v. Coegrave Brewing and Malting Co. of Toronto, xii. 571.	599, 697
The Queen v., xvii. 118.	154, 678
Steadman, Venning v., ix. 206.	317
Steamer Magnus, (Robertson v. Wigle), xv. 214.	22
Steel, Jamieson v.,	465
Steinhoff, Plumb v., xiv. 739.	75
Stephens v. Chaussé, xv. 379.	223
Gillespie v., xiv. 709.	2
v. McArthur, xix. 446.	63
Stephenson, Fraser v.,	375
Miller v., xvi. 722.	290
Stevens v. Fisk.	235
Stevenson v. The Canadian Bank of Commerce, xxii.	352
Stewart, Brady v., xv. 82.	510
v. Lees.	93
The Maritime Bank of the Dominion of Canada v., xx. 105.	452
Ontario Bank v.,	571
v. People's National Bank of Charleston.	81
Snowball v.,	570
Stuart v. Mott, xiv. 734.	600
St. Catharines Milling and Lumber Co. v. The Queen, xiii. 577.	337
St. Cesaire, Parish of, v. McFarlane, xiv. 738.	192
St. Gabriel, Corporation of, St. James v.,	147
St. James v. Corporation of St. Gabriel.	147

Table of Cases in the Digest.

945

Name of Case and where reported.	Page of Digest.
St. John, City of, v. Christie, xxi. 1.....	559
Mayor, etc., of, Edwards v.,	48
City of, v. Macdonald, xiv. 1.....	551
McSorley v., vi. 531	45
Mayor, etc., of, v. Pattison	173
City of, Peters v., xxi. 674	56
Sears v., xviii. 702.....	468
Timmerman v., xxi. 691.....	55
v. Rykert, x. 278.....	399, 613
Water Commissioners, The Queen v., xix. 125	158
St. Johns, The Central Vermont Ry. Co. v., xiv. 288	52
St. Lawrence & Ottawa Ry. Co. v. Lett, xi. 422.....	732
St. Louis, Dansereau v., xviii. 587	87, 269
Shaw v., viii. 385	418
St. Magnus, The, (Robertson v. Wigle), xv. 214	22
xvi. 720	520
St. Rose, The Corporation of the Village of, Dubois v., xxi. 65	455
Sullivan, Kelly v., i. 1	32, 411, 695, 825
Sullivan, Lawless v., iii. 117	47, 684
Sulte v. The Corporation of the City of Three Rivers, xi. 25	481
Summers v. The Commercial Union Ass. Co., vi. 19	359
Sun Life Ins. Co., Venner v., xvii. 394	377, 695
Sutherland, Cox v.,	10
Sweeny v. The Bank of Montreal, xii. 661	852
Swim v. Shirreff	142
Swinney, Rodburn v., xvi. 297	543
Sword, The Sydney & Louisburg Coal & Ry. Co. v., xxi. 152	282
Sydney & Louisburg Coal & Ry. Co. v. Sword, xxi. 152	282
Symes, Gingras v.,	14
Synod of the Diocese of Huron, Wright v., xi. 95.....	126, 673
Toronto v. De Blaquiére	537

T.

Tate, Cameron v., xv. 622	9
Taylor, Gallagher v., v. 368	380
v. Moran, xi. 347	391
The Queen v., i. 65	411, 825
v. Wallbridge, ii. 616	776
Temple v. Close	765
Nicholson	114
Theal v. The Queen vii. 397	192
Thibaudeau, Benning v., xx. 110	64, 348
Thompson v. McGillivray (Antigonish Election Case), xx. 169	272
The Molson's Bank, xvi. 664	76
Thomson v. Dymont, xiii. 303	769
Quirk, xviii. 695	119
Thrasher Case—Sewell v. B. C. Towing Co.	480, 670, 675
The, ix. 527	806
Three Rivers, Corporation of the City of, Major v.,	422
Sulte v., xi. 25	481
Tiernan, Edmonds v., xxi. 406	526

Name of Case and where reported.	Page of Digest.
Tissmerman, City of St. John v., xxi. 691	55
Titus v. Colville, xviii. 709	292
Todd, Partlo v., xvii. 196	841
Toronto, City of, Att'y-Gen'l of Canada v.,	57
Carey v., xiv. 172	786
Corporation of the City of, Godson v., xviii. 36	714
Gravel Road Co. v. County of York, xii. 517	16
Town of Levis, Quebec Warehouse Co. v.,	726
Portland v. Griffiths, xi. 333	177
Saint Johns, Central Vermont Ry. Co. v., xiv. 238	52
Township of Cambridge, The Canada Atlantic Ry. Co. v., xv. 219	184, 557
Chatham v. Township of Dover, xii. 321	548
Raleigh, Dillon v., xiv. 739	183
South Norwich, Huson v., xxi. 669	562
Tracey, Young v.,	147
Trainor v. The Black Diamond Steamship Co., of Montreal, xvi. 156	83
Travellers Ins. Co., Neill v., xii. 55	373
Treacey v. Liggett, ix. 441	238
Tremayne, The Grand Trunk Ry. Co., of Canada, v., xx. 259	748
Trémblay v. Bernier, xxi. 409	590
School Commissioners of St. Valentine, xii. 546	244
Trepanier, <i>In re</i> , xii. 111	328
Troop, Ferguson v., xvii. 527	466
v. Hart, vii. 512	762
The Liquidators of the Maritime Bank v., xvi. 456	883
v. The Merchants' Marine Ins. Co. xiii. 506	392
Trudell, The North Shore Ry. Co. v	793
Trust and Loan Co. v. Lawrason, x. 679	533, 676
v. Ruttan, i. 564	228, 688
Trustees of St. John Y. M. C. A. v. Hutchinson	210
Tuck, Jones v., xi. 197	19, 35
Tufts, Chapman v., viii. 543	83
Tupper v. Annand, xvi. 718	601
Fraser v.,	421
v. McColl (Pictou Election Case), xx. 169	272
Turner v. Prevost, xvii. 283	819
Tylee v. The Queen, vii. 651	625

U.

Union Bank of Halifax, Whitman v., xvi. 410	60, 91, 700
Lower Canada v. Bulmer	88
Dawson v.,	428
v. The Hochelaga Bank	350
Union Fire Ins. Co., <i>In re</i> (Shoolbred v. Clarke) xvii. 265	883
Shoolbred v., xiv. 624	882
Upper, The M. C. (McCallum v. Odette), vii. 36	517
Ursulines of Quebec, The North Shore Ry. Co. v	36
Utterson Lumber Co. v. Rennie, xxi. 218	860

V.

Name of Case and where reported.	Page of Digest.
Valin v. Langlois, (Montmorency Election Case), iii. 1	251, 473, 677, 684
v. Langlois, (Montmorency Election Case), iii. 90	252
Vallée v. Préfontaine, xxi. 607	101
Valois, McMillan v., (Vaudreuil Election Case), xxii. 1	460
Vanwart, The New Brunswick Ry. Co. v., xvii. 35	743
Vaudreuil Election Case, (McMillan v. Valois), xxii. 1	460
Varennes, Corporation of the Village of, The Corporation of the County of Vercheres v., xix. 365	27, 449
Vaughan v. Richardson, xviii. 703	445, 694, 700, 706
xxi. 359	809
Road Co., The Attorney-General of Ontario v., xxi. 631	188
Roberts v., xi. 273	84
Weldon v., v. 35	134
v. Wood, xviii. 703	225, 529
Venner v. The Sun Life Ins. Co., xvii. 394	377, 696
Venning v. Steadman, ix. 206	317
Vercheres, Corporation of the County of, v. The Corporation of the Village of Varennes, xix. 365	27, 449
Vernon v. Oliver, xi. 156	38, 683
Vezina v. The New York Life Ins. Co., vi. 30	370
The Quebec North Shore Turnpike Road Trustees v.,	758
v. The Queen, xvii. 1	311
Victor Hudson Cotton Co. v. Canada Shipping Co., xiii. 401	761
Victoria, Corporation of County of, v. Corporation of the County of Peterborough	558
Vineberg, Schwensen v., xix. 243	294, 661
Virtue v. Hayes, <i>In re</i> Clarke, xvi. 721	443
Vogel, The Grand Trunk Ry. Co. v., xi. 612	732
Vye, Alexander v., xvi. 501	289

W.

Waddington v. The Esquimaux & Nanaimo Ry. Co., xx. 235	206
Wadsworth v. McCord, xii. 466	237
Wagler, MacNab v.,	699
Wait, Cameron v.,	332
Waldie, Lush v. (Halton Election Case), xix. 557	28, 270, 682
Walkem, Higgins v., xvii. 225	491, 658
Walker, The Bank of B. N. A. v.	214, 425, 670, 671, 673, 697, 701, 706
Black v.,	768
City of Halifax v.,	175
v. Cornell	596
v. McMillan, vi. 241	135
Spears v., xi. 113	145
Wallace, The Ayr American Plough Co. v., xxi. 256	89
v. Bosson, ii. 488	340, 414
Burkner	669
Fraser, ii. 522	234
O'Toole	713
Souther, ii. 598	284
	672, 682
xvi. 717	86

Name of Case and where reported.	Page of Digest.
Wallbridge v. Farwell, xviii. 1.....	745
Palmer v., xv. 650.....	471
Taylor v., ii. 616.....	776
Walmsley v. Griffiths, xiii. 431.....	704
.....	670, 697, 699
Walsh v. Heffernan, xiv. 738.....	716
Montague (Haldimand Election Case), xv. 495.....	268
Warden, etc., of Dartmouth v. The Queen, ix. 509.....	515
.....	xiv. 45.....
.....	515
Lunenburg v. The Attorney-General of Nova Scotia, xx. 596.....	557
Warin v. The London & Canadian Loan & Agency Co., xiv. 232.....	565
Warner v. Murray, xvi. 720.....	334
Warnock, Kloefer v., xviii. 701.....	62
Waterbury, Dewe v., vi. 143.....	810
Waterous v. Morrow.....	138
Waterous Engine Works Co. v. Corporation of the Town of Palmerston, xxi. 536.....	562
Watson, Burnham v.,	681
Colchester, v.....	175
Webber v. Cogswell, ii. 15.....	499
Webster v. Foley, xxi. 580.....	525
Mutual Relief Society of N. S. v., xvi. 718.....	376
Weir v. Claude, xvi. 575.....	584
Weldon v. Vaughan, v. 35.....	134
Welland Election Case (German v. Rothery), xx. 376.....	275
West v. Parkdale, xii. 250.....	550
v. Seaman.....	388
Huron Election Case, The (Mitchell v. Cameron), viii. 126.....	259
Northumberland Election Case (Henderson v. Guillet), x. 635.....	263
Western Assur. Co. v. Doull, xii. 446.....	362
v. The Ontario Coal Co., xxi. 383.....	398
v. Scanlan, xiii. 207.....	391, 681
Ins. Co. v. Johnston, iv. 215.....	678
Union Telegraph Co., Canadian Pacific Ry. Co. v., xvii. 151.....	123, 154, 185
Wheeler v. Black, xiv. 242.....	794
v. Gibbs (North Ontario Election Case), iii. 374.....	273, 416
.....	iv. 430.....
.....	254
Whelan v. Ryan, xx. 65.....	54
Whidden, The Merchants' Bank of Halifax v., xix. 53.....	9, 77
White, Clarke v., iii. 309.....	10
v. Currie.....	811
v. Greenwood (Shelburne Election Case), xx. 169.....	272
McCrae v., ix. 22.....	342
Miller v., xvi. 445.....	289
v. Nelles, xi. 587.....	650
v. Parker, xvi. 699.....	4
Whitfield, Knight v.....	186
v. The Merchants' Bank.....	681
Whiting, Hovey v., xiv. 515.....	181
Whitman v. The Union Bank of Halifax, xvi. 410.....	60, 91, 700
Wigle, Robertson v. (The St. Magnus), xv. 214.....	22
.....	xvi. 720.....
.....	520
Wiley v. Smith, ii. 1.....	821

Table of Cases in the Digest.

949

Name of Case and where reported	Pages of Digest.
Wilkins v. Geddes, iii. 203	415
McLean v., xiv. 22	541
Williams v. Balfour, xviii. 472	544
v. The City of Portland, xix. 159	554
Corby v., vii. 470	761
v. Irvine, xvii	461
v. The Corporation of the Township of Raleigh, xxi. 103	560
Williston v. Lawson, xix. 673	792
Wilson, Grand Trunk Ry. Co. v.,	722
Lacoste v., xx. 218	239
Lewin v., ix. 637	532
Winchester v. Busby, xvi. 336	808
Windsor & Annapolis Ry. Co. v. The Queen and the Western Counties Ry. Co., x. 335	633, 683
Windsor Hotel Co. of Montreal v. Cross, xii. 624	787
Wineberg v. Hampson, xix. 369	450
Winnipeg, City of, Barrett v., xix. 374	484
v. Wright, xiii. 441	681
Wolff, McColl v., xiii. 130	117
v.,	673
Wood v. Esson, ix. 239	563
Lynch v.,	783
v. The Queen, vii. 631	606
vii. 634	629
Schultz v., vi. 585	669, 775
Vaughan v., xviii. 703	225, 529
Woodworth, Dickie v., (King's County N. S. Election Case), viii. 192	258
v. Dickie, xiv. 734	91
Landers v., ii. 158	479
Worswick, Bank of Montreal v.,	526
Worthington v. McDonald, ix. 327	594
Wright, The City of Winnipeg v., xiii. 441	681
v. The Incorporated Synod of the Diocese of Huron, xi. 95	126, 673
v. Kane	596
London Life Ins. Co. v., v. 466	369
Wyld, The Liverpool & London & Globe Ins. Co. v., i. 604	353, 676, 825
Wylie v. The City of Montreal, xii. 384	50
Wyman v. Imperial Ins. Co., xvi. 715	365

Y.

Yon v. Cassidy, xviii. 713	842
York, County of, The Toronto Road Co. v., xii. 517	16
Young, The Accident Insurance Co. of North America v., xx. 280	378
Rattray v.,	149, 692
v. Smith (Selkirk Election Case), iv. 494	254
v. Tracey	147

